United States Court of Appeals

for the Second Circuit

APPENDIX

75 7108

VOLUME I

B

United States Court of Appeals

For the Second Circuit

PIERRE J. LELANDAIS & CO., INC., PIERRE J. LELANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES, CORONET FUND and CREATIVE CAPITAL FUND,

Plaintiffs-Appellees,

vs.

MDS-ATRON, INC. and MOHAWK DATA SCIENCES CORP.,

Defendants-Appellants,

and

JOSEPH S. STOUTENBURGH and RICHARD L. KARPEN,

Defendants.

On Appeal from the United States District Court

For the Southern District of New York

JOINT APPENDIX ON APPEAL

UNITED STATES COURT OF APPEALS
FILED
JUN 20 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

Docket No. 72 Civ. 2278 (CLB)

PIERRE J. LE LANDAIS & CO., INC., PIERRE J. LE LANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES, CORONET FUND, and CREATIVE CAPITAL FUND,

-against-

MDS-ATRON, INC., MOHAWK DATA SCIENCES CORP., JOSEPH S. STOUTENBURGH, and RICHARD L. KARPEN.

For Plaintiff:

BUTOWSKY, SCHWENKE & DEVINE
230 Park Avenue
New York, New York 10017

For Defendant:

BEEKMAN & BOGUE
Five Hanover Square
New York, New York 10004

Docket Entries

DATE 1972	FILINGS-PROCEEDINGS
May 25	FILED COMPLAINT. ISSUED SUMMONS.
June 26	Filed Stip & Order dft. answer to complaint 20 days from the date the summons and complaint is served upon last dft. no later than 7/31/72, etc. So Ordered Gurfein, J
Aug. 1	Filed ANSWER of deft MDS-ATRON, Inc. to the complaint.
1	Filed deft. MDS-ATRON, Inc. interrogs.
11	Filed stip and order that time of deft to Answer the complaint is extended to 8-15-72 Bauman, J.
15	Filed ANSWER of deft Joseph S. Stoutenburgh to the complaint.
15	Filed ANSWER of deft Richard L. Karpen to the complaint.
15	Filed AMENDED ANSWER of deft MDS-ATRON, Inc. to the complaint.

Docket Entries

FILINGS-PROCEEDINGS

DATE 1972	
Aug. 15	Filed ANSWER of deft Mohawk Data Sciences Corp. to the complaint.
Sept. 7	Filed stipulation and order extending plaintiff' time to object or answer interrogs of deft. MDS-Atron to 9/22/72. So ordered. Gagliardi, J.
Sept.18	Filed Summons with marshals return. Served 5-31-72 MDS-ATRON, INC. Served Mohawk Data Sciences Corp. 7-26-72 Served Joseph S. Stoutenburgh 5-31-72. Served Richard L. Karpen, 7-26-72. Unable to serve: Richard L. Karpen (an individual).
26	Filed pltffs objections to interrogatories of deft MDS-ATRON, INC.
26	Filed stip & order that the time of pltffs to ANSWER the interrogatories of deft MDS-ATRON is extended to Oct. 6-72. So ordered. Tenney, J.

Docket Entries

DATE 1972	FILINGS-PROCEEDINGS
Oct. 6	Filed plaintiffs, First Notice to produce that deft Mohawk Data Sciences Corp. produce, documents on Nov. 8-1972 at 10:30 A.m.
19	Filed defts request for production of documents from pltffs., pursuant to Rule 34 of the FRCP.
24	Filed supplemental answers to interrogatories.
24	Filed ANSWERS to INTERROGATORIES.
Nov. 8	Filed deft Mohawk Data Sciences Corp. response to pltffs First Notice to produce, as indicated.
1973	
Apr. 27	Filed defts notice to take deposition of the parties indicated on dates stated.
May 1	Filed pltf's. amended complaint.
4	Filed pltffs notice to take deposition of deft. Richard L. Karpen on 5/25/73.

Docket Entries

DATE 1973	FILINGS-PROCEEDINGS
May 10	Filed defts response to notice to produce.
May 31	Filed stip and order that this action be amended as indicated, So Ordered Brieant, J.
July 17	Filed pltffs' notice to take deposition.
19	Filed deft's (Mohawk Data Sciences Corp.) response to notice to produce.
Aug. 20	Filed pltfs' 2nd notice to produce.
Sept.17	Filed defts' response to second notice to produce.
28	Filed pltffs' 2nd supplemental answers to interrogs.
Oct. 9	Filed order that this action be referred to Magistrate Goettel for all pre-trial purposes, including supervision of discovery, and to frame a pre-trial order, and report--Brieant, J.
Nov. 12	Pretrial hearing held before Magistrate Goettel.
1974	
Jan. 3	Filed Pre-Trial order. The court has been advised by Mag. Goettel that he has approved this proposed order. BRIEANT, J.

Docket Entries

DATE 1974	FILINGS-PROCEEDINGS
Feb. 4	Pretrial hearing held - Mag. Goettel.
6	Filed defts' trial brief.
11	Non-Jury Trial begun before Brieant, J.
13	Trial Cont'd.
14	Trial Cont'd & Concluded. Decision Reserved. Brieant, J.
May 22	Filed stip and order correcting stenographer's minutes, BRIEANT, J.
Aug. 19	Filed transcript of record of proceedings, dated FEB. 11, 13 & 14, 1974.
Dec. 27	Filed Findings and Conclusions #41637 . . . . Our Clerk is directed to enter Judgment in favor of the pltffs. jointly and severally against MDS-Atron, Inc. and Mohawk, only, in the amounts set forth on p. 52, supra, all and with interest at 6% per annum from 4-30-71 to the date of entry of Judgment, and costs, all pur. to Rule 58(1), F.R. Civ P., and shall also enter Judgment that all relief shall be denied to pltff ITNR, and dismissing as to defts. Stoutenburgh and Karpen. Brieant, J.

Docket Entries

DATE 1975		FILINGS-PROCEEDINGS
Jan.	2	Filed transcript of record of proceedings, dated Feb. 11, 13 [illegible], 1974.
	8	Filed JUdgment #75,023 . . . Ordered that pltffs' Pierre J. LeLandais & Co., I c., Pierre J. LeLandais, Reasearch & Science Investors, Inc., Coronet Fund and Creative Capital Fund, have judgment against defts. MDS-Atron, Inc., and Mohawk Data Sciences Corp., jointly and severally in the amounts as set forth opposite their names: Coronet: $68,542 with interest Making total of $83,758.32. Creative: $52,417., with interest Making total of $64,053.57. REL: $32,250 with interest Making a total of $39,409.50. LeLandais & Co.: $11,222.40, with interest Making a total of $13,713.77 with costs to be taxed and it is further ordered that all relief shall be denied to Pltff. International Technology & National Resources, and that the action is hereby dismissed as to defts. Joseph S. Stoutenburgh & Richard L. Karpen . . . . , Raymond F. Burghardt, Clerk ent. 1-9-75 m/n.
	10	Filed Trial Memo. of Pltffs.
	14	Filed Pltffs' Post Trial Memo.
	14	Filed Pltffs' Post-Trial Brief.

Docket Entries

DATE	FILINGS-PROCEEDINGS
1975	
Jan. 14	Filed Pltffs' Post Trial Brief's Exhibits.
Feb. 7	Filed Defts. MSA-Atron & Monhawk Data's Notice of Appeal to USCA from the final Judgment ent. 1-8-75 . . . . Notice mailed 2-10-75 to: Butoqsky, Schwenke & Devine, Esws. . . 230 Park Ave. NYC.
7	Filed Supersedas Bond in the amount of 233,288.03 . . . -- The Home Indmnity CO.
21	Filed Pltff. Intercontinental Tech. & Natural, etal. notice of cross-appeal from part of jdg. ent. on 1-8-75 . . . Copy of notice mailed on 2-24-75 to: Beekman & Bogue of 5 Hanover Sq.
28	Filed stipulation designating exhibits to be transmitted to the U.S.C.A.
28.	Filed stipulation transmitting true copies of originally filed documents which are presently missing from file.

FILED
U.S. DISTRICT
AUG 1
SD NY
11:28 AM '72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PIERRE J. LeLANDAIS & CO., INC., PIERRE J. LeLANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES, CORONET FUND, and CREATIVE CAPITAL FUND, Plaintiffs, -against- MDS-ATRON, INC., MOHAWK DATA SCIENCES CORP., JOSEPH S. STOUTENBURGH, and RICHARD L. KARPEN, Defendants.	ANSWER 72 Civ. 2278

Defendant, MDS-ATRON, INC., by its attorneys, Beekman & Bogue, for its answer:

WITH RESPECT TO THE ALLEGED JURISDICTION, PARTIES, THE MERGER, AND VENUE

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 6, 15 and 19 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admits that Pierre J. LeLandais & Co., Inc. ("LeLandais & Co.") purchased 11,000 shares of the common stock of Atron Corporation ("Atron") in or about January 1969.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except admits that Pierre J. LeLandais ("LeLandais") received 1,668 shares of the common stock of Atron in or about January 1969.

4. Denies knowledge or information sufficient to

form a belief as to the truth of the allegations contained in paragraph 5 of the complaint, except admits that Research & Science Investors, Inc. ("RSI") purchased 20,000 shares of the common stock of Atron in or about January 1969 and 5,000 shares of the common stock of Atron in or about September 1969.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint, except admits that Coronet Fund purchased 42,500 shares of the common stock of Atron in or about January 1969.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint, except admits that Creative Capital Fund purchased 42,500 shares of the common stock of Atron in or about January 1969.

7. Denies each and every allegation contained in paragraph 9 of the complaint, except admits that MDS-Atron, Inc. is a Delaware corporation and is a wholly-owned subsidiary of Mohawk Data Sciences Corp. ("MDS").

8. Denies each and every allegation contained in paragraph 10 of the complaint, except admits that the common stock of Atron was registered pursuant to Section 12 of the Securities Exchange Act of 1934 in or about March 1971.

9. Denies each and every allegation contained in paragraph 13 of the complaint, except admits that MDS is a New York corporation.

10. Denies each and every allegation contained in paragraph 18 of the complaint.

WITH RESPECT TO THE ALLEGED FIRST COUNT

11. With respect to paragraph 19 of the complaint,

repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, inclusive, of this answer as if fully set forth hereat.

12. Denies each and every allegation contained in paragraphs 21, 22, 23 and 29 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Joseph S. Stoutenburgh ("Stoutenburgh") acting individually.

13. Denies each and every allegation contained in paragraphs 24, 25 and 26 of the complaint.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the complaint, except admits that restrictions were imposed on the transfer of certain shares of MDS common stock issued by MDS in connection with the merger of Atron into MDS-Atron, Inc.

WITH RESPECT TO THE ALLEGED SECOND COUNT

16. With respect to paragraphs 30 and 34 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10 and 12 through 15 of this answer as if fully set forth hereat.

17. Denies each and every allegation contained in paragraphs 31 and 33 of the complaint.

18. Denies each and every allegation contained in paragraphs 32 and 35 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED THIRD COUNT

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 36 and 40 of the complaint.

20. With respect to paragraphs 37 and 41 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 14 and 15 of this answer as if fully set forth hereat.

21. Denies each and every allegation contained in paragraphs 38, 39 and 42 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED FOURTH COUNT

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the complaint.

23. With respect to paragraphs 44 and 46 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 14 and 15 of this answer as if fully set forth hereat.

24. Denies each and every allegation contained in paragraphs 45 and 47 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED FIFTH COUNT

25. With respect to paragraphs 48 and 53 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through

10, 12, 14 and 15 of this answer as if fully set forth hereat.

26. Denies each and every allegation contained in paragraphs 50, 52 and 54 of the complaint.

27. Denies each and every allegation contained in paragraph 51 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraph respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED SIXTH COUNT

28. With respect to paragraph 55 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10 and 12 of this answer as if fully set forth hereat.

29. Denies each and every allegation contained in paragraphs 56, 58, 59, 60 and 61 of the complaint.

WITH RESPECT TO THE ALLEGED SEVENTH COUNT

30. With respect to paragraph 62 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 26, 27 and 29 of this answer as if fully set forth hereat.

31. Denies each and every allegation contained in paragraphs 63, 64, 65 and 66 of the complaint.

WITH RESPECT TO THE ALLEGED EIGHTH COUNT

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 67 and 71 of the complaint.

33. With respect to paragraph 68 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 26, 27 and 29 of this answer as if fully set forth hereat.

34. Denies each and every allegation contained in paragraphs 69, 70 and 72 of the complaint.

AS A FIRST AFFIRMATIVE DEFENSE

35. The complaint fails to state a claim against MDS-Atron, Inc. upon which relief can be granted.

AS A SECOND AFFIRMATIVE DEFENSE

36. This Court lacks jurisdiction over the person of MDS-Atron, Inc. with respect to the alleged Third, Fourth and Eighth Counts contained in the complaint.

AS A THIRD AFFIRMATIVE DEFENSE

37. This Court does not have pendent jurisdiction over the alleged Fourth Count contained in the complaint.

AS A FOURTH AFFIRMATIVE DEFENSE

38. The agreement alleged in the Fourth Count is void and unenforceable by virtue of the applicable Statute of Frauds.

AS A FIFTH AFFIRMATIVE DEFENSE

39. MDS-Atron, Inc. did not know, nor could it have known, of any false or misleading statements or omissions as alleged in the complaint.

WHEREFORE, defendant MDS-Atron, Inc. demands judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements, including reasonable attorneys' fees, of this action; and such other and further relief as this Court deems just and proper.

BEEKMAN & BOGUE

By _____
A Member of the Firm
Attorneys for Defendant
MDS-Atron, Inc.
Office & P.O. Address
5 Hanover Square
New York, New York 10004
HAnover 2-4060

[Caption and Docket No. Omitted] Filed: August 1, 1972

INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant MDS-Atron, Inc. hereby demands that plaintiffs serve upon it signed and sworn answers to the interrogatories set forth hereinafter within thirty (30) days of service hereof:

* * *

8. (a) State whether any plaintiff sold or in any way disposed of shares of Mohawk Data Sciences Corp. ("MDS") common stock on or subsequent to April 30, 1971.

(b) If the answer to (a) above is in the affirmative, identify each such plaintiff and as to each such share and plaintiff set forth with particularity (i) whether it was received pursuant to the merger referred to in the complaint and, if not, the method through which ownership was received and the date thereof, (ii) the date when it was sold or disposed of and method of disposition, and (iii) if sold, the price at which sold, and the broker-dealer, if any, through whom sold.

(c) If the answer to (a) above is in the affirmative, describe all writings with particularity sufficient to identify them issued,

executed or in any way used or referred to in connection with each such sale or disposition including the date thereof, the names of the person or persons who had anything whatsoever to do with the preparation of such document and the names and addresses of the person or persons having custody thereof.

* * *

14. With respect to paragraph 27 of the complaint:

(a) State fully and specifically each and every fact, if any, respecting each plaintiff's attempts to sell the MDS common stock referred to.

* * *

15.(a) State whether any of the plaintiffs engaged in a "short sale" of shares of MDS common stock in April 1971 or May 1971.

* * *

17. With respect to paragraph 29 of the complaint:

* * *

(d) State fully and specifically the facts, if any, in support of plaintiffs' claim that they have been damaged in the amount of not less than $17 per share of MDS common stock held by them as of April 30, 1971.

* * *

22. With respect to paragraph 40 of the complaint:

* * *

(d) Set forth the names of each plaintiff that voted in favor of the Merger.

* * *

26. With respect to paragraph 56 of the complaint:

(a) State fully and specifically each and every statement contained in the Proxy Statement referred to which is alleged to be false and misleading other than the specific protions of the financial statements referred to in subparagraphs (a) and (b) of paragraph 56 of the complaint.

(b) State fully and specifically each and every respect not specifically referred to in the complaint in which the Proxy Statement is claimed to have omitted to state material facts necessary in order to make the statements contained therein not false or misleading.

* * *

(n) State fully and specifically the facts, if any, in support of plaintiffs' claim that at or prior to April 30, 1971 MDS intended to change its accounting policy with respect to sales of equipment on rental to affiliated third-parties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PIERRE J. LeLANDAIS & CO., INC., PIERRE J. LeLANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES, CORONET FUND, and CREATIVE CAPITAL FUND, Plaintiffs, -against- MDS-ATRON, INC., MOHAWK DATA SCIENCES CORP., JOSEPH S. STOUTENBURGH, and RICHARD L. KARPEN, Defendants.	AMENDED ANSWER 72 Civ. 2278

FILED
U.S. D.S.T.C.T.
AUG 15 1972 P.M.
S.D. N.Y.

Defendant, MDS-Atron, Inc., by its attorneys, Beekman & Bogue, for its amended answer to the complaint herein:

WITH RESPECT TO THE ALLEGED JURISDICTION, PARTIES, THE MERGER, AND VENUE

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 6, 15 and 19 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admits that Pierre J. LeLandais & Co., Inc. purchased 11,000 shares of the common stock of Atron Corporation ("Atron"), in or about January 1969.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except admits that Pierre J. LeLandais received 1,668 shares of the common stock of Atron in or about January 1969.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint, except admits that Research & Science Investors, Inc. purchased 20,000 shares of the common stock of Atron in or about January 1969 and 5,000 shares of the common stock of Atron in or about September 1969.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint, except admits that Coronet Fund purchased 42,500 shares of the common stock of Atron in or about January 1969.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint, except admits that Creative Capital Fund purchased 42,500 shares of the common stock of Atron in or about January 1969.

7. Denies each and every allegation contained in paragraph 9 of the complaint, except admits that MDS-Atron, Inc. is a Delaware corporation and is a wholly-owned subsidiary of Mohawk Data Sciences Corp. ("MDS").

8. Denies each and every allegation contained in paragraph 10 of the complaint, except admits that the common stock of Atron was registered pursuant to Section 12 of the Securities Exchange Act of 1934 in or about March 1971.

9. Denies each and every allegation contained in paragraph 13 of the complaint, except admits that MDS is a New York corporation.

10. Denies each and every allegation contained in paragraph 18 of the complaint.

WITH RESPECT TO THE ALLEGED FIRST COUNT

11. With respect to paragraph 20 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, inclusive, of this amended answer as if fully set forth hereat.

12. Denies each and every allegation contained in paragraphs 21, 22, 23 and 29 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Joseph S. Stoutenburgh ("Stoutenburgh") acting individually.

13. Denies each and every allegation contained in paragraphs 24, 25 and 26 of the complaint.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the complaint, except admits that restrictions were imposed on the transfer of certain shares of MDS common stock issued by MDS in connection with the merger of Atron into MDS-Atron, Inc.

WITH RESPECT TO THE ALLEGED SECOND COUNT

16. With respect to paragraphs 30 and 34 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10 and 12 through 15 of this amended answer as if fully set forth hereat.

17. Denies each and every allegation contained in paragraphs 31 and 33 of the complaint.

18. Denies each and every allegation contained in paragraphs 32 and 35 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED THIRD COUNT

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 36 and 40 of the complaint.

20. With respect to paragraphs 37 and 41 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 14 and 15 of this amended answer as if fully set forth hereat.

21. Denies each and every allegation contained in paragraphs 38, 39 and 42 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED FOURTH COUNT

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the complaint.

23. With respect to paragraphs 44 and 46 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 14 and 15 of this amended answer as if fully set forth hereat.

24. Denies each and every allegation contained in paragraphs 45 and 47 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraphs respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED FIFTH COUNT

25. With respect to paragraphs 48 and 53 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through

10, 12, 14 and 15 of this amended answer as if fully set forth hereat.

26. Denies each and every allegation contained in paragraphs 49, 50, 52 and 54 of the complaint, except admits that Atron solicited proxies by means of a Proxy Statement, dated April 16, 1971, which was distributed through the mails.

27. Denies each and every allegation contained in paragraph 51 of the complaint, except denies, upon information and belief, the truth of the allegations contained in said paragraph respecting Stoutenburgh acting individually.

WITH RESPECT TO THE ALLEGED SIXTH COUNT

28. With respect to paragraph 55 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10 and 12 of this amended answer as if fully set forth hereat.

29. Denies each and every allegation contained in paragraphs 56, 58, 59, 60 and 61 of the complaint.

WITH RESPECT TO THE ALLEGED SEVENTH COUNT

30. With respect to paragraph 62 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 26, 27 and 29 of this amended answer as if fully set forth hereat.

31. Denies each and every allegation contained in paragraphs 63, 64, 65 and 66 of the complaint.

WITH RESPECT TO THE ALLEGED EIGHTH COUNT

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 67 and 71 of the complaint.

33. With respect to paragraph 68 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, 12, 26,

27 and 29 of this amended answer as if fully set forth hereat.

34. Denies each and every allegation contained in paragraphs 69, 70 and 72 of the complaint.

AS A FIRST AFFIRMATIVE DEFENSE

35. The complaint fails to state a claim against MDS-Atron, Inc. upon which relief can be granted.

AS A SECOND AFFIRMATIVE DEFENSE

36. This Court lacks jurisdiction over the person of MDS-Atron, Inc. with respect to the alleged Third, Fourth and Eighth Counts contained in the complaint.

AS A THIRD AFFIRMATIVE DEFENSE

37. This Court does not have pendent jurisdiction over the alleged Fourth Count contained in the complaint.

AS A FOURTH AFFIRMATIVE DEFENSE

38. The agreement alleged in the Fourth Count contained in the complaint is void and unenforceable by virtue of the applicable Statute of Frauds.

AS A FIFTH AFFIRMATIVE DEFENSE

39. MDS-Atron, Inc. did not know, nor could it have known, of any false or misleading statements or omissions as alleged in the complaint.

AS A SIXTH AFFIRMATIVE DEFENSE

40. The Common Shares of Atron which were purchased by plaintiffs from Atron in 1968 and 1969 were sold by Atron without registration under the Securities Act of 1933 pursuant to an exemption thereunder in reliance upon representations by plaintiffs that they were purchasing such shares for investment.

41. Upon information and belief, plaintiffs were, at the times referred to in the complaint, and still are, experienced and sophisticated investors in securities and knew, or should have known, (i) the meaning and ramifications of

their "investment representation" and (ii) that Atron was selling them such shares relying upon the bona fides of such representation.

42. As such, plaintiffs knew, or should have known, that they could not have sold their Common Shares of Atron prior to three years from the date of the latest purchase of Atron Common Shares, unless such shares were registered under the Securities Act of 1933, and that therefore the shares of MDS Common Stock they would receive in exchange for their Atron Common Shares in connection with the merger of Atron into MDS-Atron, Inc. would not be unrestricted and free of legend, but, on the contrary, would, as required by then existing law, be restricted and legended and that restrictions on transfer would be placed thereon, all in the manner and to the extent that the plaintiffs had agreed upon at the time of their purchase of such Atron Common Shares.

43. By reason of the foregoing, plaintiffs are estopped from pleading the claims and injuries alleged in the complaint.

AS A SEVENTH AFFIRMATIVE DEFENSE

44. MDS-Atron, Inc., repeats and realleges each and every allegation contained in paragraphs 40, 41 and 42 of this amended answer as if fully set forth hereat.

45. In order to afford plaintiffs the opportunity to sell the shares of MDS Common Stock they received on exchange of their Atron Common Shares, MDS prepared and filed, as soon as practicable after the merger of Atron into MDS-Atron, Inc., a Registration Statement under the Securities Act of 1933 and offered plaintiffs an opportunity to register such shares of MDS Common Stock.

46. Plaintiffs, with full knowledge of the facts alleged in the complaint, instructed MDS to register all or

part of the shares of MDS Common Stock they received in exchange for their Atron Common Shares. Said Registration Statement became effective in August 1971.

47. By reason of the acts and conduct of the plaintiffs as aforesaid, plaintiffs waived the claims and injuries alleged in the complaint.

WHEREFORE, defendant MDS-Atron, Inc. demands judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements, including reasonable attorneys' fees, of this action; and such other and further relief as this Court deems just and proper.

BEEKMAN & BOGUE

By _____
A Member of the Firm
Attorneys for Defendant MDS-Atron, Inc.
Office & P.O. Address
5 Hanover Square
New York, New York 10004
HAnover 2-4060

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PIERRE J. LeLANDAIS & CO., INC., PIERRE J. LeLANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES, CORONET FUND, and CREATIVE CAPITAL FUND,	
Plaintiffs,	ANSWER
-against-	72 Civ. 2278
MDS-ATRON, INC., MOHAWK DATA SCIENCES CORP., JOSEPH S. STOUTENBURGH, and RICHARD L. KARPEN,	
Defendants.	

FILED
U.S.D.C. S.D. N.Y.
AUG 15 1972
S.D. N.Y.

Defendant, Mohawk Data Sciences Corp., by its attorneys, Beekman & Bogue, answers the Sixth, Seventh and Eighth Counts contained in the complaint herein as follows:

WITH RESPECT TO THE ALLEGED JURISDICTION, PARTIES, THE MERGER, AND VENUE

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 6, 15 and 19 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admits, upon information and belief, that Pierre J. LeLandais & Co., Inc. purchased 11,000 shares of the common stock of Atron Corporation ("Atron") in or about January 1969.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except admits, upon information and belief, that Pierre J. LeLandais received 1,668 shares of the common stock of Atron in or about January 1969.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint, except admits, upon information and belief, that Research & Science Investors, Inc. purchased 20,000 shares of the common stock of Atron in or about January 1969 and 5,000 shares of the common stock of Atron in or about September 1969.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint, except admits, upon information and belief, that Coronet Fund purchased 42,500 shares of the common stock of Atron in or about January 1969.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint, except admits, upon information and belief, that Creative Capital Fund purchased 42,500 shares of the common stock of Atron in or about January 1969.

7. Denies each and every allegation contained in paragraph 9 of the complaint, except admits that MDS-Atron, Inc. is a Delaware corporation and is a wholly-owned subsidiary of Mohawk Data Sciences Corp. ("MDS").

8. Denies each and every allegation contained in paragraph 10 of the complaint, except admits that the common stock of Atron was registered pursuant to Section 12 of the Securities Exchange Act of 1934 in or about March 1971.

9. Denies each and every allegation contained in paragraph 13 of the complaint, except admits that MDS is a New York corporation.

10. Denies each and every allegation contained in paragraph 18 of the complaint.

WITH RESPECT TO THE ALLEGED SIXTH COUNT

11. With respect to paragraph 55 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 10, inclusive, of this answer as if fully set forth hereat, and denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 21 and 49 of the complaint, except admits that Atron solicited proxies by means of a Proxy Statement, dated April 16, 1971, which was distributed through the mails.

12. Denies each and every allegation contained in paragraphs 56, 58, 59, 60 and 61 of the complaint.

WITH RESPECT TO THE ALLEGED SEVENTH COUNT

13. With respect to paragraph 62 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 12, inclusive, of this answer as if fully set forth hereat, and denies each and every allegation contained in paragraphs 50 and 51 of the complaint, except denies, upon information and belief, the truth of the allegations contained in paragraph 51 of the complaint respecting Joseph S. Stoutenburgh.

14. Denies each and every allegation contained in paragraphs 63, 64, 65 and 66 of the complaint.

WITH RESPECT TO THE ALLEGED EIGHTH COUNT

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 67 and 71 of the complaint.

16. With respect to paragraph 68 of the complaint, repeats and realleges each and every denial, admission and allegation contained in paragraphs 1 through 13, inclusive, of this answer as if fully set forth hereat.

17. Denies each and every allegation contained in paragraphs 69, 70 and 72 of the complaint.

AS A FIRST AFFIRMATIVE DEFENSE

18. The complaint fails to state a claim against MDS upon which relief can be granted.

AS A SECOND AFFIRMATIVE DEFENSE

19. The Common Shares of Atron which were purchased by plaintiffs from Atron in 1968 and 1969 were sold by Atron without registration under the Securities Act of 1933 pursuant to an exemption thereunder in reliance upon representations by plaintiffs that they were purchasing such shares for investment.

20. Upon information and belief, plaintiffs were, at the times referred to in the Sixth, Seventh and Eighth Counts of the complaint, and still are, experienced and sophisticated investors in securities and knew, or should have known, (i) the meaning and ramifications of their "investment representation" and (ii) that Atron was selling them such shares relying upon the bona fides of such representation.

21. As such, plaintiffs knew, or should have known, that they could not have sold their Common Shares of Atron prior to three years from the date of the latest purchase of Atron Common Shares unless such shares were registered under the Securities Act of 1933, and that therefore the shares of MDS Common Stock they would receive in exchange for their Atron Common Shares in connection with the merger of Atron into MDS-Atron, Inc. would not be unrestricted and free of legend, but, on the contrary, would, as required by then existing law, be restricted and legended and that restrictions on transfer would be placed thereon, all in the manner and to the extent that the plaintiffs had agreed upon at the time of their purchase of such Atron Common Shares.

22. By reason of the foregoing, plaintiffs are

estopped from pleading the claims and injuries alleged in the Sixth, Seventh and Eighth Counts of the complaint.

AS A THIRD AFFIRMATIVE DEFENSE

23. MDS repeats and realleges each and every allegation contained in paragraphs 19, 20 and 21 of this answer as if fully set forth hereat.

24. In order to afford plaintiffs the opportunity to sell the shares of MDS Common Stock they received on exchange of their Atron Common Shares, MDS prepared and filed, as soon as practicable after the merger of Atron into MDS-Atron, Inc., a Registration Statement under the Securities Act of 1933 and offered plaintiffs an opportunity to register such shares of MDS Common Stock.

25. Plaintiffs, with full knowledge of the facts alleged in the Sixth, Seventh and Eighth Counts of the complaint, instructed MDS to register all or part of the shares of MDS Common Stock they received in exchange for their Atron Common Shares. Said Registration Statement became effective in August 1971.

26. By reason of the acts and conduct of the plaintiffs as aforesaid, plaintiffs waived the claims and injuries alleged in the Sixth, Seventh and Eighth Counts of the complaint.

WHEREFORE, defendant Mohawk Data Sciences Corp. demands judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements, including reasonable attorneys' fees, of this action; and such other and further relief as this Court deems just and proper.

BEEKMAN & BOGUE

By _____
A Member of the Firm
Attorneys for Defendant
Mohawk Data Sciences Corp.
Office & P.O. Address
5 Hanover Square
New York, New York 10004
HAnover 2-4060

[Caption and Docket No. Omitted] Filed: October 24, 1972

ANSWERS TO
INTERROGATORIES

Plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure, hereby answer the interrogatories of defendant MDS-Atron, Inc., dated July 31, 1972:

* * *

5. Interrogatory 8. (a) Yes.

(b)(1) LeLandais & Co. disposed of MDSC common stock (all received in the Atron-MDS-Atron merger) as follows:

Date/shares	Price/share	Broker/dealer
9/1(9)/71--1500	27 1/2	Merkin & Co.
9/1(9)/71--83	27 3/8	Merkin & Co.

(2) Research and Science Investors, Inc. disposed of MDSC common stock (all shares sold long were received in the Atron-MDS-Atron merger) as follows:

Date/shares	Price/share	Broker/dealer
11/3/71 --500	20	
11/12/71--400	17 1/2	
11/12/71--100	17 5/8	
11/17/71--500	15 3/8	
11/16/71--500	16 1/8	
11/19/71--500	15	

RSI unintentionally made short sales of MDSC stock after April 30, 1971. Details will be provided in supplement on interrogatories 14 and 15.

(3) Coronet Fund unintentionally made short sales of MDSC stock after April 30, 1971. Details will be provided in supplement on interrogatories 14 and 15.

(4) Creative Capital Fund disposed of MDSC common stock (all received in the Atron--MDS-Atron merger) as follows:

Date/shares	Price/share	Broker/dealer
11/22/71--4062	15 1/4	

(c) All sales described in subparagraph (b) above were made pursuant to a prospectus of MDSC dated August 25, 1971 (and the related registration statement filed with the SEC). On information and belief, the prospectus was prepared by MDSC, and true copies are in its custody. With the exception of the usual confirmations and account statements and a letter from LeLandais to Phillip Ablove on or about September 1, 1971, plaintiffs have no knowledge of any other writings of the kind described.

* * *

14. Interrogatory 17.

* * *

(d), (e), (f) As a result of the Atron-MDS-Atron merger plaintiffs were forced to exchange Atron shares for MDSC shares at a ratio of 4 for 1. Had the proxy statement not been false and misleading and the true financial condition of MDSC then been known to Atron shareholders and the public, the merger either would not have been approved or the exchange ratio would have been more than $17 per share more favorable to Atron shareholders. In addition, (1) had the MDSC common stock received by the plaintiffs as a result of

the merger not been restricted plaintiffs could have sold it for not less than $44 per share, whereas because of the restrictions, they were not able to sell it until the market price deteriorated to less than $28 per share, and (2) had the plaintiffs known that they would not receive freely transferable stock the merger might not have been approved. The market price of MDSC common stock at various points in time is reflected in the records of the New York Stock Exchange. Plaintiffs will be unable to list other writings supporting the amount of their damages until they have conducted discovery in this action.

* * *

18. Interrogatory 22.

* * *

(d) All plaintiffs.

* * *

21. Interrogatory 26. Plaintiffs will be unable to answer this interrogatory completely until they have conducted discovery in this action.

(a) The following statements contained in the proxy statement are alleged on information and belief to be false and misleading:

(1) The statements made in the first sentence of the first paragraph on page 15;

(2) The statements in the second full paragraph on page 15;

(3) The last sentence in the third paragraph on page 15;

(4) The characterization of backlog included in the last paragraph on page 15;

(5) The statement in the second paragraph on page 24 that "Mohawk recently commenced a program of marketing its equipment to End Users pursuant to extended term leases ranging from 2 to 5 years, with options to extend for additional periods.";

(6) The second full paragraph in Note J of the Notes to Financial Statements of Mohawk on page 46;

(7) The first sentence of the fifth full paragraph on page 25.

(b) (1) The proxy statement failed to disclose that deliveries pursuant to the long-term rental program being initiated by Mohawk would properly be accounted for as lease transactions rather than sales; that such long-term rentals were being utilized in an attempt to distort the proportion of sales to rentals of Mohawk's products and to inflate the amount of Mohawk's net income; that the effect of accounting for such transactions as sales would be to overstate income for the periods involved; that, upon information and belief, Mohawk's certified public accountants had suggested to Mohawk that accounting for such rentals as sales was improper; that Mohawk was considering changing its accounting policy with respect to such transactions and that such a change would

materially adversely affect Mohawk's results of operations as presented in the proxy statement; that Mohawk was considering changing its fiscal year from July 31 to April 30, and that the effect of a change in the fiscal year would be to accentuate the impact of the accounting change on the results for the period ended April 30, 1971;

(2) The proxy statement omitted to state material facts necessary to describe accurately the agreements pursuant to which Mohawk was effecting its alleged sales of computer equipment and failed to state the circumstances under which Mohawk might be required to assume payment obligations or to repurchase equipment under its long-term leases and the material adverse effect of such obligation upon Mohawk's business; on information and belief, the proxy statement failed to disclose the fact that Mohawk had already experienced significant difficulties with the return of equipment allegedly sold pursuant to long-term leases.

* * *

(n) On May 5, 1971 Mohawk made a formal press release regarding its change of accounting policy. Therefore, this change had to have been considered prior to April 30, 1971.

[Caption and Docket No. Omitted] Filed: October 24, 1972

SUPPLEMENTAL ANSWERS
TO INTERROGATORIES

Plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure, hereby supplement their answers to the interrogatories of defendant MDS-Atron, Inc., dated July 31, 1972; the answers herein supplemented were served by plaintiffs on September 22, 1972.

* * *

8. Interrogatories 14 and 15. On May 19, 1971 RSI sold 500 shares of MDSC common stock at $42.25 per share and 500 shares at $42.50 per share. On May 20, 1971 it sold 500 shares at $42.875 per share. On July 19, 1971 it purchased 1,500 shares at $29.50 per share.

On May 12, 1971 Coronet Fund sold 5,312 shares of MDSC common stock at between $44.50 and $44.375 per share (total proceeds $234,503.58). On June 2, 1971 it purchased 5,312 shares at between $41.50 and $41.625 per share (total cost $220,449.50). All of Coronet Fund's sales and purchases were through Fahnestock & Co. Coronet Fund has confirmations of all transactions.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAY 31 1973
SD of NY

PIERRE J. LeLANDAIS & CO., INC., et al

Plaintiffs,

-against-

MDS-ATRON, INC., et al

Defendants.

STIPULATION

72 Civ. 2278 CJB Jr.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for all parties herein:

(1) that the complaint in this action be, and it hereby is, amended to read as per the annexed Exhibit A;

(2) that the answers to the original complaint of all defendants be, and they hereby are, deemed to be the answers of all defendants to the amended complaint, in that defendants' responses to paragraphs which have been altered in the amended complaint remain unchanged, except that all defendants admit the allegations contained in paragraph 13 of the amended complaint.

Dated: New York, New York
May 29, 1973

BUTOWSKY, SCHWENKE & DEVINE

By Michael C. Devine
A Member of the Firm
Attorneys for Plaintiffs

MICRO FILM
MAY 30 1973

BEEKMAN & BOGUE

By Milton P. Thayer
A Member of the Firm
Attorneys for Defendants

SO ORDERED:
Date: 5/31/73

/s/ CHARLES J. BRIEANT, JR.
Hon. Charles J. Brieant, Jr., U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

PIERRE J. LeLANDAIS & CO., INC., PIERRE J. LeLANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATURAL RESOURCES, S.A., CORONET FUND, and CREATIVE CAPITAL FUND,

Plaintiffs,

-against-

MDS-ATRON, INC., MOHAWK DATA SCIENCES CORP., JOSEPH S. STOUTENBURGH, and RICHARD L. KARPEN,

Defendants.

- x

72 Civ. 2278 CJBJr.

AMENDED COMPLAINT

Plaintiffs, by their attorneys, Butowsky, Schwenke & Devine, for their amended complaint, herein allege:

JURISDICTION, PARTIES, THE MERGER, AND VENUE

1. This Court has jurisdiction of this action by virtue of 28 U.S.C. §1331, §27 of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. §78aa), and principles of pendent jurisdiction.

2. The matter in controversy exceeds $10,000, exclusive of interest and costs.

3. Plaintiff Pierre J. LeLandais & Co., Inc. ("LeLandais & Co.") is a corporation incorporated under the laws of the State of New York, and it has an office in the State of New York. On April 30, 1971 LeLandais & Co. owned beneficially 6,332 shares of the common stock of Atron Corporation ("Atron"), 5,500 of which it had purchased on or about January 15, 1969.

4. Plaintiff Pierre J. LeLandais ("LeLandais") resides in the State of New York. On April 30, 1971 LeLandais owned of record

832 shares of the common stock of Atron, which he had purchased on or about December 17, 1968. On April 30, 1971 LeLandais & Co. was the beneficial owner of those 332 shares.

5. Plaintiff Research & Science Investors, Inc. ("RSI") is a corporation incorporated under the laws of the State of Maryland, and it has an office in New York, New York. On April 30, 1971 RSI owned beneficially 10,000 shares of the common stock of Atron, which it had purchased on or about January 15, 1969.

6. Plaintiff Intercontinental Technology & Natural Resources S.A. ("ITNR") is a corporation incorporated under the laws of Luxembourg. On April 30, 1971 ITNR owned beneficially 5,000 shares of the common stock of Atron, which it had purchased on or about November 18, 1969.

7. Plaintiff Coronet Fund is a partnership, and it has an office in New York, New York. On April 30, 1971 Coronet Fund owned beneficially 21,250 shares of the common stock of Atron, which it had purchased on or about January 15, 1969.

8. Plaintiff Creative Capital Fund is a partnership, and it has an office in the State of New Jersey. On April 30, 1971 Creative Capital Fund owned beneficially 16,250 shares of the common stock of Atron, which it had purchased on or about January 15, 1969.

9. On information and belief, defendant MDS-Atron, Inc. ("MDS-Atron") is a corporation incorporated under the laws of the State of Delaware; it has its principal office in New York, New York; and it is a wholly-owned subsidiary of defendant Mohawk Data Sciences Corp. ("Mohawk").

10. On information and belief, the common stock of Atron was at all relevant times prior to April 30, 1971 registered pursuant to Section 12 of the Exchange Act.

11. On April 30, 1971 Atron was merged into MDS-Atron

("Merger"). By virtue of the Merger, MDS-Atron assumed all of the liabilities of Atron.

12. The Merger was approved by the vote of the holders of more than two-thirds of the then outstanding shares of Atron common stock, at a special meeting held on April 30, 1971.

13. On information and belief, defendant Mohawk is a corporation incorporated under the laws of the State of New York, and it has an office in New York, New York.

14. The Merger was accomplished by exchanging the common stock of Atron for shares of Mohawk common stock, at the ratio of four (4) shares of Atron stock for each share of Mohawk stock.

15. All of the Atron common stock owned beneficially by the plaintiffs on April 30, 1971 was exchanged for Mohawk common stock, at the Merger ratio of 4-for-1.

16. On information and belief, defendant Joseph S. Stoutenburgh ("Stoutenburgh") at all relevant times prior to the Merger was the President and a Director of Atron, and on the date of the Merger he became the President and a Director of MDS-Atron.

17. On information and belief, defendant Richard L. Karpen ("Karpen") was both a Director of Atron and an officer, namely Executive Vice President, of Mohawk in the period from January, 1971 through April 30, 1971, the date of the Merger, and thereafter was both a Director of MDS-Atron and an officer of Mohawk.

18. Several acts and transactions constituting the violations alleged occurred in this district.

19. This action properly is brought in this district by virtue of 28 U.S.C. §1391 and §27 of the Exchange Act (15 U.S.C. §78aa).

FIRST COUNT -- AGAINST
MDS-ATRON AND STOUTENBURGH

20. Paragraphs 1 through 19 are here repeated and re-alleged.

21. During April, 1971 Stoutenburgh, acting individually and as an agent and officer of Atron, by use of the telephone and other means and instrumentalities of interstate commerce, solicited proxies from plaintiffs for the purpose of voting in favor of the Merger.

22. Certain of these solicitations occurred during April, 1971 in telephone conversations between LeLandais and Stoutenburgh, wherein LeLandais stated that certain Atron shareholders, including all plaintiffs in this action, as a condition to their vote in favor of the Merger wanted it to be confirmed to them that the Mohawk common stock which they would receive if the Merger were approved would be unrestricted and free of legend, and that it could be sold in market transactions without registration under the Securities Act of 1933.

23. In response Stoutenburgh confirmed to LeLandais that the Mohawk common stock to be received in the Merger by plaintiffs, and other shareholders of Atron, would be unrestricted and free of legend, and that it could be sold in market transactions without registration under the Securities Act of 1933.

24. These solicitation statements were material.

25. These solicitation statements were when made, and in light of the circumstances under which they were made, false and misleading in that the transferability of the Mohawk common stock which was received by the plaintiffs was restricted; the certificates representing the stock were legended; and in the absence of registration under the Securities Act of 1933 the stock could not be sold in market transactions.

26. These solicitation statements constituted violations of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder.

27. Subsequent to April 30, 1971, the Merger date,

plaintiffs desired to, and several of the plaintiffs attempted to, sell, on registered national securities exchanges, the Mohawk common stock they received in exchange for their Atron common stock.

28. Due to restrictions on transfer imposed by Mohawk, plaintiffs' attempted sales could not be consummated.

29. As a result of the violations of Section 14(a) of the Exchange Act committed by Soutenburgh and MDS-Atron (Atron's successor) plaintiffs have been damaged in the amount of not less than $17 per share of Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

SECOND COUNT -- AGAINST
MDS-ATRON AND STOUTENBURGH

30. Paragraphs 1 through 19 and paragraphs 21 through 24 are here repeated and realleged.

31. These statements were false and misleading, and were relied upon by plaintiffs.

32. These statements were made, used, and employed by Stoutenburgh, individually and as an agent and officer of Atron, as a deceptive device and contrivance in connection with plaintiffs' sale of their Atron common stock and plaintiffs' purchase of Mohawk common stock (in the Merger exchange).

33. These statements constituted violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

34. Paragraphs 27 and 28 are here repeated and realleged.

35. As a result of the violations of Section 10(b) of the Exchange Act committed by Stoutenburgh and MDS-Atron (Atron's successor), plaintiffs have been damaged in the amount of not less than $17 per share of Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to

be determined at the trial of this action.

THIRD COUNT -- AGAINST
MDS-ATRON AND STOUTENBURGH

36. This Court's jurisdiction of this count is based on principles of pendent jurisdiction.

37. Paragraphs 1 through 19 and paragraphs 21 through 23 are here repeated and realleged.

38. These statements by Stoutenburgh were false.

39. At the time these statements were made by Stoutenburgh, he knew, or should have known, that they were false.

40. Plaintiffs relied on these statements in voting in favor of, and not opposing, the Merger and in exchanging their Atron common stock for Mohawk common stock at the ratio of four (4) shares of Atron for one (1) share of Mohawk.

41. Paragraphs 27 and 28 are here repeated and realleged.

42. As a result of the foregoing misrepresentations, made by Stoutenburgh individually and as an agent and officer of Atron, plaintiffs have been damaged in the amount of not less than $17 per share of Mohawk common stock held by them as of April 30,1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

FOURTH COUNT -- AGAINST
MDS-ATRON AND STOUTENBURGH

43. This Court's jurisdiction of this count is based on principles of pendent jurisdiction.

44. Paragraphs 1 through 19 and paragraphs 22 and 23 are here repeated and realleged.

45. Stoutenburgh thus promised and agreed, for a good and valuable consideration, individually and as an agent and officer of Atron, that plaintiffs would receive Mohawk common

stock free of transfer restriction, free of legend, and which could be sold in market transactions without registration under the Securities Act of 1933.

46. Paragraphs 27 and 28 are here repeated and realleged.

47. Stoutenburgh and MDS-Atron (Atron's successor) thus breached the agreement with plaintiffs, and as a result, plaintiffs have been damaged in the amount of not less than $17 per share of Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

FIFTH COUNT -- AGAINST MDS-ATRON

48. Paragraphs 1 through 19 and paragraph 21 are here repeated and realleged.

49. Atron solicited proxies from plaintiffs, for the purpose of voting in favor of the Merger, by means of a proxy statement, dated April 16, 1971, which was distributed through the mails ("Proxy Statement").

50. The Proxy Statement omitted to state material facts necessary in order to make the statements therein not misleading in that it did not state that the shares of Mohawk common stock to be received by a substantial number of Atron shareholders, including all plaintiffs in this action, would be restricted, legended, and that they could not be sold in market transactions without registration under the Securities Act of 1933.

51. The Proxy Statement omitted to state material facts necessary to correct the false and misleading statements earlier communicated by Stoutenburgh to LeLandais, and others, as more fully stated in paragraph 23 above.

52. These omissions in the Proxy Statement constituted violations of Section 14(a) of the Exchange Act and 14a-9 promulgated thereunder.

53. Paragraphs 27 and 28 are here repeated and realleged

54. As a result of the violations of Section 14(a) of the Exchange Act committed by MDS-Atron (Atron's successor) plaintiffs have been damaged in the amount of not less than $17 per share of the Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

SIXTH COUNT -- AGAINST
MDS-ATRON, MOHAWK, AND KARPEN

55. Paragraphs 1 through 19 and paragraphs 21 and 49 are here repeated and realleged.

56. The Proxy Statement contained statements which, at the time and in the light of the circumstances under which they were made, were false and misleading, or which omitted to state material facts necessary in order to make the statements therein not false or misleading, including, but not limited to, the following:

(a) the financial statements for Mohawk overstated Mohawk's revenues (by at least $3,792,000), net income (by at least $1,490,000), and book value for the fiscal year ended July 31, 1970; and

(b) the financial statements for Mohawk substantially overstated Mohawk's revenues, net income, and book value for the 6-month period from August 1, 1970 to January 31, 1971; and

(c) no disclosure was made of Mohawk's consideration of the need to, or its intention to, change its accounting policy with respect to sales of equipment on rental to affiliated third parties; and

(d) the description of the terms and conditions upon which Mohawk sold or leased its equipment, and the

means of accounting for such sales or leases, was unclear and inaccurate, and sought to disguise the fact that Mohawk's revenues and book value were overstated.

57. Substantially all of the financial information respecting Mohawk contained in the Proxy Statement was prepared and supplied by Mohawk.

58. The foregoing misstatements and omissions in the Proxy Statement constituted violations of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder.

59. Defendant Karpen, who at the time of the Merger was both an Atron Director and Executive Vice President of Mohawk, knew, or should have known, at least several weeks before the Merger, of the misrepresentations and omissions in the Proxy Statement and of Mohawk's intention to announce, three business days after the Merger, significant corrections of its financial statements.

60. In violation of his fiduciary duties, Karpen never advised the Atron Board of Directors or the Atron shareholders of the Proxy Statement misrepresentations and omissions, nor of Mohawk's intended announcement.

61. As a result of the violations of Section 14(a) of the Exchange Act committed by MDS-Atron (Atron's successor) and Mohawk, which violations were aided and abetted by Karpen, plaintiffs voted in favor of, and did not oppose, the Merger, and they have been damaged in the amount of not less than $17 per share of the Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

SEVENTH COUNT -- AGAINST
MDS-ATRON, MOHAWK, AND KARPEN

62. Paragraphs 1 through 19, paragraph 21, paragraphs 49 through 51, paragraphs 56 and 57, and paragraphs 59 and 60 are here repeated and realleged.

63. The Proxy Statement was used and employed as a deceptive device by Atron and Mohawk in connection with plaintiffs' sale of their Atron common stock and plaintiffs' purchase of Mohawk common stock (in the Merger exchange).

64. Plaintiffs relied upon the misstatements and omissions in the Proxy Statement in selling their Atron common stock and in purchasing Mohawk common stock (in the Merger exchange).

65. These misstatements and omissions, used as a deceptive device, constituted violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

66. As a result of the violations of Section 10(b) of the Exchange Act committed by MDS-Atron (Atron's successor) and Mohawk, which violations were aided and abetted by Karpen, plaintiffs have been damaged in the amount of not less than $17 per share of Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

EIGHTH COUNT -- AGAINST
MDS-ATRON, MOHAWK, AND KARPEN

67. This Court's jurisdiction of this count is based on principles of pendent jurisdiction.

68. Paragraphs 1 through 19, paragraph 21, paragraphs 49 through 51, paragraphs 56 and 57, and paragraphs 59 and 60 are here repeated and realleged.

69. The misstatements and omissions in the Proxy Statement were false and misleading.

70. At the time these misstatements and omissions were made by Atron and Mohawk, they (Atron and Mohawk) and Karpen, knew, or should have known, that they were false and misleading.

71. Plaintiffs relied on these statements in voting in favor of, and not opposing, the Merger and in exchanging their Atron common stock for Mohawk common stock at the ratio of four (4) shares of Atron for one (1) share of Mohawk.

72. As a result of the foregoing misrepresentations, made by Atron and Mohawk, and as a result of Karpen's failure to advise either Atron's Board of Directors or Atron's shareholders of the misrepresentations, plaintiffs have been damaged in the amount of not less than $17 per share of Mohawk common stock held by them as of April 30, 1971, the exact amount of each plaintiff's damage to be determined at the trial of this action.

WHEREFORE, plaintiffs demand judgment on each and every count, against the defendants named in each count, jointly and severally where more than one defendant is named in a particular count, awarding each plaintiff money damages, in an amount to be determined at the trial of this action, but in excess of $10,000 as to each plaintiff, together with interest from April 30, 1971, and the costs and disbursements of this action, including reasonable attorneys fees.

BUTOWSKY, SCHWENKE & DEVINE

By_____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

US DISTRICT COURT FILED JAN 3 1974 SD of N.Y.

PIERRE J. LeLANDAIS & CO., INC., et al., Plaintiff,	72 Civ. 2278 CJB Jr.
-against-	~~PROPOSED~~ PRE-TRIAL ORDER
MDS-ATRON, INC., et al., Defendants.	

MICROFILM JAN 3 1974

STIPULATED FACTS

1. This Court has subject matter jurisdiction of all counts, except count FOURTH as to which there is dispute, and venue in this district is proper.

2. This Court has personal jurisdiction over all defendants, except Stoutenburgh as to whom there is dispute.

3. Atron Corporation ("Atron") was a Minnesota corporation, incorporated in 1968. As of April 30, 1971, it was merged into defendant MDS-Atron, Inc. ("MDS-Atron"), MDS-Atron being the surviving corporation. Throughout the existence of Atron, defendant Joseph S. Stoutenburgh was its President and a director.

4. MDS-Atron is a Delaware corporation, incorporated in 1971. Defendant Mohawk Data Sciences Corp. ("Mohawk") is a publicly owned New York corporation whose common stock is, and at all times during 1971 was, traded on the New York Stock Exchange. MDS-Atron is, and at all times has been, a wholly owned subsidiary of Mohawk.

5. Mohawk purchased 15,000 shares of Atron common

stock at 25 cents per share in December, 1968, in conjunction with the initial subscription to shares by the founders of Atron and signed a so-called letter of investment intent (def's. exh. A i.d.). On or about January 7, 1969, Mohawk purchased an additional 375,000 shares of Atron common stock at ~~$1.00~~ 50 per share. In July, 1969, Atron reverse split its stock 1 share for 2 shares (hereinafter referred to as "split"), so that after the split Mohawk owned 195,000 shares of Atron common stock. In addition, the Mohawk Pension Trust purchased 16,000 shares of Atron stock at $6.25 per share in September, 1969, in connection with a private placement of 80,000 shares of Atron common stock, and it signed a stock purchase agreement which included representations of investment intent (def's. exh. B i.d.). The certificates representing all Mohawk's shares (as well as those of the Mohawk Pension Trust) bore the following restrictive legend:

> THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE BEEN PURCHASED UNDER INVESTMENT PRESENTATIONS AND NO TRANSFER OR OTHER DISPOSITION MAY BE MADE EXCEPT IN COMPLIANCE WITH THE REQUIREMENTS OF THE SECURITIES ACT OF 1933.

6. At all relevant times, Atron's business was the design, development, manufacture, systems engineering, programming, marketing and support of small computers and terminal systems. Approximately 90% of Atron's sales were to Mohawk.

7. At all relevant times, Mohawk's business was the design, development, manufacture and sale or rental, in a variety of markets, of electronic data processing equipment designed to be used in association with most computer systems.

8. Throughout the period from approximately July, 1970, to April 30, 1971, defendant Richard [illegible] was both an officer and director of Mohawk and a director of Atron.

9. Throughout the period from mid-March, 1971, through April 30, 1971, the common stock of Atron was registered pursuant to §12 of the Securities Exchange Act of 1934 (pl.'s exh. 26 i.d.).

10. Plaintiff Pierre J. LeLandais resides in New York. LeLandais owns, and at all relevant times owned, all of the stock of plaintiff Pierre J. LeLandais & Co. ("LeLandais & Co."), a New York corporation. LeLandais, through SCI Capital Corp., purchased 1,668 shares of Atron common stock at 25 cents per share in December, 1968, in conjunction with the initial subscription to shares by the founders of Atron, and he executed a subscription agreement (pl.'s exh. 1 i.d.). The certificates representing LeLandais' shares bore a restrictive legend substantially the same as that set forth in paragraph 5 above (def.'s exh. S i.d.). (The word "Legend" is used hereinafter to describe all legends substantially the same as that set forth in paragraph 5 above.) As of the July, 1969 split of Atron stock, LeLandais owned 834 shares of Atron common stock. The certificates representing the split shares bore the Legend (certificates collectively are pl.'s exh. 2 i.d.). On April 2, 1971, LeLandais sold his 834 Atron shares to LeLandais & Co. for $8 per share, but no transfer of registration occurred, nor was attempted. LeLandais did not notify Atron of the sale. LeLandais, as record owner, voted all 834 shares in favor of the merger between Atron and MDS-Atron ("Merger") (def.'s exh. P i.d.).

11. LeLandais & Co. purchased 11,000 shares of Atron common stock at $1 per share on or about January 15, 1969, in connection with a private placement of 575,000 shares, and it signed a stock purchase agreement and a so-called letter of investment intent (collectively pl.'s exh. 3 i.d.). The certificates representing the shares of LeLandais & Co. bore the Legend.

As of the July, 1969 split of Atron stock, LeLandais & Co. owned 5,500 shares of Atron common stock, and the certificates representing those shares bore the Legend (certificates collectively are pl.'s exh. 4 i.d.). All 5,500 shares were recorded as having been voted in favor of the Merger (def.'s exh. P i.d.).

12. Plaintiff Research & Science Investors, Inc. ("RSI") is a venture capital fund, incorporated under the law of Maryland. RSI purchased 20,000 shares of Atron common stock at $1 per share in the January, 1969 private placement, and it signed a stock purchase agreement and a so-called letter of investment intent (collectively pl.'s exh. 5 i.d.). The certificates representing RSI's shares bore the Legend. As of the July, 1969, split of Atron stock, RSI owned 10,000 shares of Atron common stock and the certificates representing those shares bore the Legend (certificates collectively are pl.'s exh. 6 i.d.). RSI voted these 10,000 shares in favor of the Merger (def.'s exh. P i.d.).

13. Plaintiff Intercontinental Technology & Natural Resources, S.A. ("ITNR") is a foreign investment fund, and is a Luxembourg corporation.

(a) With respect to ITNR, ITNR and RSI contend as follows: ITNR, acting through RSI, purchased 5,000 shares of Atron common stock at $6.25 per share in September, 1969, in connection with the private placement of approximately 80,000 shares of Atron common stock, and RSI signed, again acting as agent for ITNR, a stock purchase agreement which included representations of investment intent (collectively pl.'s exh. 7 i.d.). The certificates representing ITNR's shares (pl.'s exh. 8 i.d.) bore a legend.* None of ITNR's shares were voted either for or against the Merger.

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* The legend on these certificates (set out in full in annexed schedule B) was somewhat different from the Legend.

(b) With respect to ITNR and RSI, defendants contend as follows: RSI was the purchaser of the aforesaid 5,000 shares; RSI executed the aforesaid stock purchase agreement, and defendants had at all relevant times, and still have, no knowledge of ITNR. Defendants do not dispute that 5,000 shares were purchased in September, 1969, for $6.25 per share in connection with the aforesaid private placement. The shares originally were issued in the name of RSI, and subsequently (December 9, 1969) were transferred to the nominee name of Boyd & Co., Boyd & Co. being the nominee for Schroder Trust Company, at the request of RSI, and were so registered on the date of the Merger (def.'s exhs. Q and Y i.d.). The shares were not voted with respect to the Merger.

14. Plaintiff Coronet Fund ("Coronet") is a venture capital fund, and it is a partnership in which Rudolph E. Ludt is, and has been since prior to 1969, a general partner. Coronet purchased 42,500 shares of Atron common stock at $1 per share in the January, 1969 private placement, and it signed a stock purchase agreement and a so-called letter of investment intent (collectively pl.'s exh. 9 i.d.). The certificates representing Coronet's shares bore the Legend. As of the July 1969 split of Atron stock, Coronet owned 21,250 shares of Atron common stock and the certificates representing those shares bore the Legend (certificates collectively are pl.'s exh. 10 i.d.). Coronet voted all 21,250 shares in favor of the Merger (def.'s exh. P i.d.).

15. Plaintiff Creative Capital Fund ("Creative") is a venture capital fund, and it is a partnership in which Irwin L. Tow is, and has been since prior to 1969, a general partner. Creative purchased 42,500 shares of Atron common stock at $1 per share in the January, 1969 private placement, and it signed a stock purchase agreement and a so-called

letter of investment intent collectively pl.'s exh. 11 i.d.). The certificate representing Creative's shares bore the Legend. As of the July, 1969 split of Atron stock, Creative owned 21,250 shares of Atron common stock, and again the certificates representing those shares bore the Legend. Subsequently Creative submitted the certificate to be broken down into smaller denominations, and by mistake these certificates did not bear the Legend. (Certificates collectively are pl.'s exh. 12 i.d.). On or about February 2, 1970 Creative sold 5,000 shares of its Atron stock to Robert D. Goldberger Investment Co., which executed a so-called "investment letter" and Atron consented to the transfer. The sales price was $10.25 per share. Following the sale, Creative owned 16,250 shares of Atron common stock, and it voted all 16,250 shares in favor of the Merger (def.'s exh. P i.d.).

16. The following chart outlines the ownership of Atron common stock as of April 30, 1971, and it also shows how many shares originally were issued in each of the categories. All figures are adjusted to show the effect of the 1 for 2 reverse stock split in July, 1969. As of April 30, 1971, all of the stock listed in the chart was restricted as to sale or other distribution, pursuant to various stock purchase agreements and letters of investment intent, and bore the Legend, except the certificates held by Creative, and with the additional exception of those shares noted in the category "public offering". The latter shares were freely transferable and traded publicly in the "over the counter" market.

Category of Offering and Purchasers	Shares of Atron Issue Date	Shares of Atron At 4/30/71	Position with Atron, if any, on 4/30/71
A. Founders (purchased 12/68 at 50 cents per share):	237,500	226,666	
(a) Wesley Anderson	10,000	10,000	
(b) Robert Burkholder	30,000	30,000	Employee

Category of Offering and Purchasers		Shares of Atron Issue Date	Shares of Atron At 4/30/71	Position with Atron, if any, on 4/30/71
(c)	Jack Germaine	10,000	10,000	Employee
(d)	Robert Gountanis	24,000	24,000	Vice President
(e)	John Halsey	3,750	3,750	
(f)	Mark Koschmann	20,000	20,000	Vice President and Director
(g)	Finley McLeod	16,000	16,000	Vice President
(h)	John Miller	10,000	10,000	Employee
(i)	Mohawk	7,500	7,500	
(j)	Herman Osofsky	32,000	32,000	Vice President
(k)	SCI Capital Corp.	3,750	2,916	(834 shares issued to P. LeLandais--see par.10)
(l)	Dennis Stanga	20,000	20,000	Vice President, Treasurer and Director
(m)	Donald Stanga	12,500	12,500	Employee
(n)	D. Bruce Stewart	10,000	*	
(o)	Joseph Stoutenburgh	28,000	28,000	President and Director
B.	Mohawk (purchased 1/69 at $1.00 per share):	187,500	187,500	
C.	First Private Placement (Purchased 1/69 at $2.00 per share):	287,500	262,000	
(a)	Boston Equity Associates	15,000	15,000	
(b)	Carl Clauson	12,500	12,500	
✓ (c)	Coronet Fund	21,250	21,250	

* 6,000 shares never issued; 4,000 shares purchased by and issued to J. S. Stoutenburgh.

Category of Offering and Purchasers		Shares of Atron Issue Date	At 4/30/71	Position with Atron, if any, on 4/30/71
(d)	Creative Capital Fund	21,250	16,250	(5,000 shares sold to R. D. Goldberger Investment Co. on 2/2/70 - see par. 15)
(e)	Endowment Management & Research Corporation	15,000	*	
(f)	Herman Fasbender	25,000	25,000	
(g)	Fred Alger Pension Trust	10,000	10,000	
(h)	Fred Alger Profit Sharing Trust	15,000	15,000	
(i)	Jack/Elaine Germaine	1,000	1,000	Employee
(j)	Robert Gountanis	2,000	2,000	Vice President
(k)	John/Cecelia Halsey	25,000	25,000	
(l)	James/Mary Horan	5,000	5,000	
(m)	H. Kaye Kerr	5,000	5,000	
(n)	LeLandais & Company	5,500	5,500	
(o)	Finley McLeod	1,000	1,000	
(p)	L.E. Miller Investment Company	10,000	10,000	
(q)	Harry/Ruth Pleu	10,000	10,000	
(r)	Gerald Rauenhorst	10,000	10,000	
(s)	Research & Science Investors	10,000	10,000	
(t)	Harris Shapiro	10,000	**	
(u)	D. Bruce Stewart	500	***	

* Sold to Ladenburgh, Thalmann & Co.

** Sold pursuant to an opinion letter from Atron's counsel.

*** Never issued.

Category of Offering and Purchasers	Shares of Atron Issue Date	At 4/30/71	Position with Atron, if any, on 4/30/71
(v) Joseph Stoutenburgh	5,000	5,000	President and Director
(w) Tamarack Associates	12,500	12,500	
(x) The Value Line Development Capital Corporation	12,500	12,500	
(y) Joseph Whitney	22,500	22,500	
(z) Loren Wyss	5,000	5,000	
D. Second Private Placement (Purchased 9/69 at $6.25 per share):	80,000	75,000	
(a) Anna Bing	11,000	11,000	
(b) Francis Cabot, Trustee	1,067	1,067	
(c) Francis Cabot, Trustee	1,067	1,067	
(d) Francis Cabot, Trustee	1,066	1,066	
(e) Mohawk Pension Trust	16,000	16,000	
(f) Morgan Guarantee Trust Company of New York, Trustee	40,000	40,000	
(g) Abby O'Neill	3,200	3,200	
(h) George O'Neill	1,600	1,600	
(i) Research & Science Investors	5,000	*	
E. Public Offering (1/70, total 300,000 shares plus 150,000 warrants, sold as units of 2 shares plus 1 warrant):	300,000	300,000	

* See contentions in paragraph 13 above.

17. The officers and directors of Atron who were responsible for its formation previously had been employed by Univac division of Sperry-Rand and were known to Mohawk.

18. In connection with the formation of Atron, Stoutenburgh went to John Halsey for investment banking advice. Halsey was Stoutenburgh's brother-in-law, and he was an employee of Stralem & Co. ("Stralem"), an investment banking firm. Halsey introduced Stoutenburgh to LeLandais, who at that time was a p a r t n e r of Stralem. Subsequently, Stralem advised Atron with respect to the raising of Atron's initial capital, which is outlined in category A of the chart in ¶ 16 above. SCI Capital Corp., a listed purchaser of founders' shares, then was a wholly-owned subsidiary of Stralem.

19. In January, 1969 the first private placement of Atron common stock, outlined in category C of the chart in ¶ 16 above, occurred. Stralem assisted in that placement and was compensated for its assistance. There were 25 purchasers in the placement, of which LeLandais introduced 6 (including certain of the plaintiffs), Halsey introduced 13, and 5 already were associated with Atron.

20. In February, 1969 LeLandais and Halsey left Stralem. Le Landais became a p a r t n e r of Hamershlag Borg & Co., a securities broker-dealer, and Halsey became an employee of the same firm. Hamershlag Borg then became Atron's investment banker.

21. On March 18, 1969 Atron's board of directors was increased from 3 to 6 members. Stoutenburgh, Dennis C. Stanga, and Wesley J. Anderson were existing directors, and Richard Rifenburgh (then Executive Vice President of Mohawk), Mark

Koschmann (a Vice-President of Atron), and LeLandais (then with Hamershlag Borg) were added.

22. Shortly after the first private placement, Atron began considering ways of raising additional capital. In this connection LeLandais and Halsey searched for an underwriter for a proposed public offering of Atron's common stock.

23. In early summer, 1969, LeLandais introduced Atron to Ladenburg, Thalmann & Co., a potential underwriter of the proposed public offering. At that time, all concerned contemplated that Hamershlag Borg would participate as a co-managing underwriter with Ladenburg, Thalmann in the proposed public offering.

24. In or about July, 1969, and in advance of the proposed public offering, Atron reverse split its stock exchanging 1 share for 2 shares (as previously referred to). In September, 1969 Atron privately placed 80,000 shares of the after-split stock, as outlined in category D of the chart in ¶ 16 above. Hamershlag Borg assisted Atron in connection with this second private placement and was compensated for its assistance.

25. On January 14, 1970, the public offering of Atron's stock and warrants was effectuated, as outlined in category E of the chart in ¶ 16 above. Ladenburg, Thalmann was the managing underwriter of the public offering. Sometime prior to the effective date of the offering Hamershlag Borg was eliminated as a potential co-managing underwriter. As of the time of the public offering Ladenburg, Thalmann became Atron's investment banker.

26. In June, 1970 LeLandais tendered his resignation as a director of Atron, and in July, 1970, his vacancy was filled by Jeffrey Weiss of Ladenburg, Thalmann. LeLandais previously had agreed to resign in deference to a representative of the new

investment banker for Atron. In July, 1970 Rifenburgh tendered his resignation as a director of Atron, and his vacancy was filled by Karpen (minutes are pl.'s exh.13 i.d.).

27. On January 29, 1971 Rifenburgh and Wayne Wells, representing Mohawk and Stoutenburgh, Stanga and Koschmann, representing Atron, met in New York and agreed in principle on the Merger. The agreement in principle provided for an exchange of Atron stock for Mohawk stock, at the ratio of 1 share of Mohawk for 4 shares of Atron. A press release was issued the same day (pl.'s exh.14 i.d.). A formal agreement and plan of merger was executed by the parties as of March 12, 1971 (pl.'s exh. 15 i.d.). Prior to the date of execution, the board of directors of Mohawk had approved the proposed agreement (minutes are pl.'s exh. 16 i.d.). On March 5, 1971 the board of directors of Atron had approved the proposed agreement, subject to the approval of Atron shareholders. Karpen, who then was Executive Vice-President and a director of Mohawk, did not attend the March 5, 1971 meeting of Atron's board of directors, nor did he vote on the proposed agreement. Weiss of Ladenburg, Thalmann attended the March 5, 1971 meeting, but he did not vote on the proposed agreement (minutes of March 5, 1971 meeting are pl.'s exh. 17 i.d.). March 26, 1971 was set as the Atron shareholder record date for purposes of voting on the Merger. As of that date there were 704 holders of record of Atron stock, entitled to vote 1,090,110 issued and outstanding shares (see def.'s exh. X i.d.). Under applicable law (Minnesota) 2/3 of the issued and outstanding shares (726,740) were required for approval of the Merger.

28. The Atron proxy material was mailed to Atron shareholders on April 16, 1971 (the proxy statement is pl.'s exh.18

i.d.). The material in the proxy statement concerning Mohawk was prepared by Mohawk.

29. The special meeting of Atron shareholders was held in Minnesota on April 30, 1971. The Merger was approved, the vote being as follows:

FOR -- 924,756 -- 84.8% of issued and outstanding;

AGAINST -- 3,600 -- less than 1%.

(The vote record is def.'s exh. C i.d.). No Atron shareholder exercised dissenters' rights.

30. Thus the Merger was approved and became effective on April 30, 1971.

31. On April 29, 1971 the Mohawk shares to be exchanged in the Merger for Atron common stock were listed with the New York Stock Exchange (listing application is def.'s exh. D i.d.).

32. On April 30, 1971 Rifenburgh, then President of Mohawk, wrote a letter to all Atron shareholders stating that the Merger had been approved and enclosing a Letter of Transmittal for use by shareholders in submitting their Atron certificates to be exchanged for Mohawk certificates (the letter is pl.'s exh. 19 i.d.).

33. On or about May 5, 1971, Coronet Fund placed an order with its broker (Fahnestock & Co.) to sell 5,312 shares of Mohawk stock and the order was executed by the broker on or about May 5, 1971, at a total price of $234,603.58, net of commissions. Coronet Fund delivered to its broker its certificate representing 21,250 shares of Atron common stock, with all necessary stock powers. These certificates bore the Legend. Coronet Fund's broker tendered the Atron certificates, bearing the Legend, to

Mohawk's transfer agent to be exchanged for Mohawk certificates. Mohawk's transfer agent issued Mohawk certificates bearing a restrictive legend.* On June 2, 1971 Coronet Fund purchased on the New York Stock Excnange, through its broker (Fahnestock & Co.) 5,312 shares of Mohawk stock at a total price of $221,878.25, including commissions, to cover its previous sale of that number of shares.

34. On or about May 12, 1971 RSI placed an order with its broker (Merkin & Co., Inc.) to sell 1,500 shares of Mohawk stock, and the order was executed by the broker on or about May 12, 1971, at a total price of $63,102.11, net of commissions. RSI delivered to its broker its certificates representing 10,000 shares of Atron common stock, with all necessary stock powers. These certificates bore the Legend. RSI's broker tendered the Atron certificates, bearing the Legend, to Mohawk's transfer agent to be exchanged for Mohawk certificates. Mohawk's transfer agent issued Mohawk certificates bearing a restrictive legend. On or about July 12, 1971 RSI purchased on the New York Stock Exchange, through its broker (Merkin & Co., Inc.) 1,500 shares of Mohawk stock, at a total price of $44,677.50, including commissions, to cover its previous sale of that number of shares.

35. On May 26, 1971, Rifenburgh, as President of Mohawk, wrote a letter to all former Atron shareholders explaining that all Atron shareholders who formerly held legended Atron certificates were receiving legended Mohawk certificates and that Mohawk expected to clear those shares for public sale by registering them with the Securities and Exchange Commission. Mohawk requested that all holders of Mohawk certificates with restrictive legends notify Mohawk if they chose to have their shares included

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*The legend on these certificates is set out in full in annexed Schedule C.

in the registration. (The letter is pl.'s exh. 20 i.d.).

36. On August 25, 1971 a Mohawk registration statement and prospectus became effective, and it cleared for sale the shares of Mohawk stock which had been issued in exchange for restricted Atron certificates for all those holders of Mohawk certificates with restrictive legends that timely had requested that their shares be included in the registration. All Mohawk shares received by the plaintiffs in exchange for their restricted Atron shares were included in the registration statement, with the exception of the 1,250 shares registered in the name of Boyd & Co.* (The registration statement is pl.'s exh. 21 i.d., see def.'s exhs. K and L i.d.).

37. Pursuant to the registration statement, certain of the plaintiffs sold their Mohawk stock as follows:

Plaintiff	Shares	Settlement Date	Total Proceeds (net of commissions)
(a) Coronet	312	11/9/71	$ 5,970.17
(b) Creative	4,062	11/30/71	60,459.36
(c) RSI	2,500	11/16/71 - 11/29/71	41,260.21
(d) LeLandais & Co.	1,583	9/9/71 approx.	43,520.00

38. Certain of the plaintiffs still hold their Mohawk stock, as follows:

Plaintiff	Shares Held
(a) Coronet	5,000
(b) ITNR*	1,250

39. Mohawk common stock, as listed on the New York Stock Exchange, was traded at the prices shown on the chart annexed hereto as Schedule A. From January 4, 1971 through April 30, 1971, Atron common stock was quoted in the over-the-counter market at the prices shown on the "pink sheets" (def.'s exh. Z i.d.).

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* See contentions in paragraph 13 above.

40. On May 4, 1971 Rifenburgh and Wells of Mohawk met with certain security analysts in King of Prussia, Pennsylvania, and discussed Mohawk's business and financial affairs. A press release was issued (pl.'s exh. 22 i.d.).

41. In its May 5, 1971 edition, the Wall Street Journal carried an article on Mohawk. (A copy of their report is pl.'s exh. 23 i.d.).

42. On June 30, 1971 Mohawk's board of directors met (minutes are pl.'s exh. 24 i.d.).

43. On July 7, 1971 Mohawk issued a press release (pl.'s exh. 25 i.d.).

44. Plaintiffs are all experienced and sophisticated investors and have participated in other transactions in which they received restricted stock.

FACT CONTENTIONS

A. Contentions of Plaintiffs.

1. Plaintiffs contend that in soliciting proxies in favor of the Atron -- MDS-Atron merger defendants Atron (now MDS-Atron) and Stoutenburgh violated § 14(a) of the Exchange Act and SEC Rule 14a-9 by making untrue statements concerning whether the stock to be received by plaintiffs in the merger was to be restricted as to transfer.

2. Plaintiffs also contend that in soliciting proxies defendant Atron violated § 14(a) and Rule 14a-9 by failing to state in the proxy statement that the stock to be received by plaintiffs in the merger was to be restricted as to transfer.

3. Plaintiffs also contend that these misrepresentations and omissions constitute violations of § 10(b) of the Exchange Act, SEC Rule 10b-5, and common law fraud principles.

4. Plaintiffs contend that the proxy statement distributed by Atron in soliciting merger proxies additionally was false and misleading in that certain financial information concerning Mohawk was incomplete and inaccurate. Plaintiffs contend that such misrepresentations and omissions constitute violations of §§ 10b and 14a of the Exchange Act, SEC Rules 10b-5 and 14a-9, and common law fraud principles by Atron (now MDS-Atron) and Mohawk. In addition, plaintiffs contend that Karpen violated common law fiduciary duties to Atron (as a director) in not disclosing to the board of directors of Atron financial information about Mohawk which he knew or should have known.

B. Defendants' Contentions of Fact.

1. Joseph S. Stoutenburgh was never personally served.

2. Each of the plaintiffs knew the meaning and ramifications of its investment representations made in connection with the purchase of Atron shares and Atron relied on these representations.

3. In the September 1969 private placement RSI purchased 5,000 Atron shares and executed a subscription agreement with representations of investment intent. Atron relied on these representations.

4. Atron had no knowledge of ITNR, was never informed that any shares were being purchased on behalf of ITNR and was never aware that any of its shares were ever owned by ITNR.

5. During the months of August to October 1970 considerable friction developed between LeLandais and Stoutenburgh making their ability to do business together impossible.

6. Prior to January 29, 1971, the officers and directors of Atron had given considerable thought to the possibility of a merger with MDS. Reasons favoring the merger were: 1) more than 90% of Atron sales and services were to MDS; 2) Atron had no marketing capacity nor the financial backing to develop it; 3) Atron had no significant customers other than MDS; and, 4) MDS had the option to manufacture Atron's products if it so chose.

7. On January 29, 1971, Atron met with MDS to discuss a new product that Atron hoped to manufacture to be included in an MDS system. At this meeting MDS suggested a merger through an exchange of stock. The exchange ratio was arrived at based on the current market prices of both MDS and Atron shares and the additional facts that 1) Atron had a substantial loss in its prior fiscal year, 2) Atron was projecting a loss for the current fiscal year, 3) Atron had no substantial revenues from any party other than MDS, and 4) that MDS could manufacture Atron's products rather than purchase them from Atron.

8. Stoutenburgh had two conversations with LeLandais concerning the merger. The first conversation took place just after the January 29th meeting. The second occurred on February 17, 1971. During these conversations Stoutenburgh outlined all of the reasons why the merger was favorable to Atron. Stoutenburgh also told LeLandais that MDS had told him that MDS would

like to give Atron's restricted shareholders free stock if they could. Stoutenburgh never promised or ever told LeLandais that plaintiffs would receive free stock.

9. Prior to the merger, neither Stoutenburgh nor any other person from Atron or MDS ever had any conversations with anyone at Coronet, Creative, RSI or ITNR respecting the merger, soliciting any votes in favor of the merger, or concerning free stock.

10. Plaintiffs knew or should have known that they could not sell their restricted Atron shares and that they would receive restricted MDS shares in exchange for their restricted Atron shares.

11. If plaintiffs did not know that they could not sell their restricted Atron shares or that they would receive restricted MDS shares in exchange for their restricted Atron shares this lack of knowledge was due to the negligence of plaintiffs and not due to any negligence on the part of defendants.

12. Atron hired John Halsey, who had arranged for the purchase of 175,000 Atron shares* in the private placements, to solicit proxies from Atron's private placement investors. Halsey solicited many of these investors and was compensated for his efforts by Atron. By early March 1971, Atron was assured of 487,750 shares in favor of the merger (67% of the shares required to approve the merger) taking account only of Atron insiders, Halsey, MDS and Morgan Guaranty and Trust Co. Further, there was no known opposition to the merger.

13. Ladenburg, Thalmann & Co. had originally objected to the terms of the merger but after a meeting

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*Taking into account the 1 for 2 reverse stock split.

with MDS in February 1971 they withdrew their objection. Ladenburg voted the Atron shares it owned beneficially and of record (except for 100 shares owned of record) in favor of the merger.

14. On April 2, 1971, LeLandais sold the beneficial interest in his Atron shares to LeLandais & Co. Atron had no knowledge of this transaction and the opinion of Atron's counsel was never requested. The shares were never presented to Atron's transfer agent for transfer to LeLandais & Co. On April 30, 1971, LeLandais did not own beneficially any Atron shares. In spite of this, LeLandais indicated to MDS that he was the owner of 208 MDS shares received in the exchange for Atron shares and requested that MDS register the shares. The registration statement reflects LeLandais as the owner of these shares.

15. On April 19, 1971, LeLandais, without being requested by Stoutenburgh or anyone from Atron or MDS, wrote to the Atron private placement investors recommending that they vote in favor of the merger. The letter did not mention free stock. Stoutenburgh did not know of, or receive a copy of, this letter.

16. By April 30, 1971, MDS had not determined whether or not it could issue free stock in exchange for restricted Atron stock.

17. Whether or not MDS issued restricted or unrestricted stock to holders of Atron restricted stock was tangential to the reasons for and the terms of the merger. MDS had 5,000,000 shares outstanding and the issuance of an additional 200,000 shares, as a result of the merger, would have had no effect on the market for MDS shares.

18. The restricted stock of MDS was more salable to other sophisticated investors and had a higher value than restricted stock of Atron.

19. By April 30, 1971, MDS had made no decision on whether or not it would change its method of accounting for sales to non-affiliated third-party lessors. The consideration of this change had not progressed, by April 30, 1971, beyond a very preliminary discussion between Wayne Wells and Richard Rifenburgh. Further, neither the MDS Executive Committee nor its Board met prior to June 30, 1971 with respect to any accounting changes nor had any consideration been had of any other accounting changes.

20. On May 4, 1971, MDS announced that changes in its accounting policies were under review.

21. Karpen, an Executive Vice President of MDS in charge of engineering and a director of MDS, did not know and had no reason to know of the preliminary conversations taking place between Wells and Rifenburgh. Further, he did not know and had no reason to know on April 30, 1971, or before, of any possible change in MDS' accounting policy with respect to sales to non-affiliated third-party lessors then under preliminary consideration.

22. MDS' accounting practices during its 1970 and 1971 fiscal years were in accordance with generally accepted accounting principles and its financial statements and reports presented fairly the financial position of MDS and the results of MDS' operations during and for those years in conformity with generally accepted accounting principles.

23. MDS' sales of equipment to non-affiliated third-party lessors and the method of accounting therefor was described in the Atron proxy statement.

C. Plaintiffs' contention regarding damages.

Plaintiffs contend that they are entitled to damages measured as follows:

Plaintiff	Mohawk shares	Potential Sales Price	Actual Sales Price	Difference
(1) LeLandais (LeLandais & Co.)	208	$ 9,335	$ 5,720	$ 3,615
(2) LeLandais & Co.	1,375	61,710	37,800	23,910
(3) Coronet Fund	312	14,003	5,970	8,033
(4) Coronet Fund	5,000	224,400	*	213,150
(5) Creative Capital Fund	4,062	182,303	60,459	121,844
(6) RSI	2,500	112,200	41,260	70,940
(7) ITNR	1,250	56,100	*	53,287
Total damages				$494,779

Alternatively plaintiffs may be entitled to a rescissional remedy, namely the difference between what they received for their stock (or its value at trial) and its value as unrestricted Mohawk stock on 4/30/71.

D. Defendants' contention regarding damages.

Defendants contend that plaintiffs' asserted measure of damages is inappropriate. Counsel have agreed that defendants may offer evidence and legal theories in opposition to plaintiffs' asserted measure of damages even though such evidence and theories are not described here in detail.

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* Market price at time of trial. Approximately 2-1/4 on 12/31/73, which value is used to compute "difference".

EXHIBIT LIST

The attorneys for plaintiffs and defendants have listed the following as the documents which at this time they intend to offer at trial. They have agreed that those documents marked "X" are authentic, and they have agreed that those marked "Y" are relevant and admissible. In all other respects objections are reserved. The attorneys have agreed that they promptly will inform each other of any changes in, or additions to, the list.

Ex. #	Description	
Pl.-1	SCI Capital Subscription Agreement dtd. 12/30/68	XY*
Pl.-2	New Atron certificates (LeLandais)	XY
Pl.-3	LeLandais & Co. Subscription Agreement dtd. 1/15/69	XY
Pl.-4	New Atron certificates (LeLandais & Co.)	XY
Pl.-5	RSI Subscription Agreement dtd. 1/15/69	XY
Pl.-6	New Atron certificates (RSI)	XY
Pl.-7	RSI (ITNR?) Subscription Agreement dtd. 9/11/69	XY
Pl.-8	New Atron certificates (RSI)	XY
Pl.-9	Coronet Subscription Agreement dtd. 1/15/69	XY
Pl.-10	New Atron certificates (Coronet)	XY
Pl.-11	Creative Subscription Agreement dtd. 1/15/69	XY
Pl.-12	New Atron certificates (Creative)	XY
Pl.-13	Atron board minutes dtd. 7/14/70	XY
Pl.-14	1/29/71 press release	XY
Pl.-15	Agreement and Plan of Merger	XY

* X - Agreement on Authenticity
Y - Agreement on Admissibility

Ex. #	Description	
Pl.-16	MDS board minutes dtd. 3/2/71	XY
Pl.-17	Atron board minutes dtd. 3/5/71	XY
Pl.-18	Atron Proxy Statement dtd. 4/16/71	XY
Pl.-19	MDS letter of 4/30/71 with Letter of Transmittal	XY
Pl.-20	MDS letter of 5/26/71	XY
Pl.-21	MDS Registration Statement 8/25/71	XY
Pl.-22	MDS 5/4/71 press release	X
Pl.-23	5/5/71 Wall Street Journal article	X
Pl.-24	MDS board minutes dtd. 6/30/71	XY
Pl.-25	MDS 7/7/71 press release	XY
Pl.-26	Atron 12(g) Registration dtd. 1/14/71	XY
Pl.-27	LeLandais letter dtd. 2/5/71	XY
Pl.-28	LeLandais letter dtd. 4/19/71	XY
Pl.-29	LeLandais phone record dtd.4/19/71	XY
Pl.-30	MDS 10-Q dtd. 3/12/71	
Pl.-31	Rudi Ludt's notes including phone bills for June 1971	XY
	33	
	34	
D.-A	MDS Subscription Agreement dtd. 1/7/69	XY
D.-B	MDS Pension Fund Subscription Agreement dtd. 9/11/69	XY
D.-C	Record of vote on merger	XY
D.-D	MDS NYSE Listing Application dtd. 4/29/71	XY
D.-E	LeLandais letter dtd. 8/24/70	X
D.-F	LeLandais letter dtd. 9/22/70	X
D.-G	Stoutenburgh letter dtd. 9/15/70	X
D.-H	LeLandais private placement list	X
D.-I	Atron shareholder list of 9/69	
D.-J	Stoutenburgh expense report for 2/15-2/17/71	XY

Ex. #	Description	
D.-K	MDS letter dtd. 8/19/71	XY
D.-L	MDS letter dtd. 8/25/71	XY
D.-M	Atron phone record for April - May 1971	X
D.-N	LeLandais letter dtd. 4/2/71	XY
D.-O	Atron Annual Report for 1970	X
D.-P	Atron proxies	XY
D.-Q	Stock transfer records of Atron	XY
D.-R	Morgan Guaranty letter dtd. 3/10/71	XY
D.-S	Old Atron certificates	XY
D.-T	Reuters Tape dtd. 4/19/71	XY
~~D.-U~~	~~Robert Senator's notes of 5/4/71~~	
D.-V	Atron board minutes dtd. 8/18/70; 9/18/70 and 11/10/70	XY
D.-W	Notice of Atron Annual Meeting and Proxy dtd. 12/30/70	XY
D.-X	Letters of First Trust Co. of St. Paul dtd.,4/21/71, 4/22/71, 4/23/71, 4/26/71, 4/28/71	XY
D.-Y	Atron certificate issued in name of RSI in September 1969 and related transfer documents into name of Royd & Co.	XY
D.-Z	"Pink Sheets" for Atron common stock from January 4, 1971 through April 30, 1971	XY
DAA	Curtis Notes	XY
DAB	Three notes	XY
DAC	Graph MDS - Atron	XY
DAD	Desk Book	XY
DAE	(Part) all items	XY
DAF-	[illegible]	XY
DAG-	APB	XY

WITNESS LIST

The parties at this time expect to call at trial witnesses from the following lists. The attorneys have agreed that they promptly will inform each other of any changes in, or additions to, the list.

A. Plaintiffs' witnesses.

(1) Pierre J. LeLandais

(2) Rudolph Ludt

(3) Irwin LePow

(4) John French

(5) Leonard Boehner

(6) Harvey Wertheim

(7) Joan Kane

(8) Wayne Wells

(9) Joseph Stoutenburgh

(10) Ronald Hengen

(11) Mr. Schmedel

(12) Richard Karpen

(13) Philip Ablove

B. Defendants' Proposed witnesses.

(1) Joseph Stoutenburgh

(2) Richard L. Karpen

~~(3) Wayne Wells~~

(4) Richard Rifenburgh

(5) Ronald Hengen

(6) Robert S. Senator

~~(7) John Halsey~~

(8) Expert witness respecting values of restricted stock

(9) Fossner

(10) L & L ship.

AMENDMENTS TO DEFENDANTS'
ANSWERS TO AMENDED COMPLAINT.

The answer to the amended complaint of each of the defendants is amended so as to include the following affirmative defense:

> The damage claimed to have been sustained by plaintiffs, or any of them, was caused solely or contributed to by their negligence.

Dated: New York, New York
January 4, 1974

BUTOWSKY, SCHWENKE & DEVINE

By Michael C. Devine
A Member of the Firm
Attorneys for Plaintiffs

BEEKMAN & BOGUE

By _____
A Member of the Firm
Attorneys for Defendants

APPROVED:

The Court has been advised by Mag Gettel that the ... approved these proposed ...
s/ CLB JR/USDJ
Magistrate

SO ORDERED: JAN 3 1974

s/ CHARLES L BRIEANT JR.
U.S.D.J.

SCHEDULE A

(Mohawk Common Stock Prices)

DATE	CLOSING PRICE
1/15	24 5/8
1/18	24 5/8
1/19	24 1/4
1/20	24
1/21	25 3/8
1/22	27 1/8
1/25	29 1/4
1/26	28 7/8
1/27	29 3/8
1/28	29
1/29	29
2/1	31 1/8
2/2	30 3/4
2/3	30 3/4
2/4	30 7/8
2/5	31 1/4
2/8	31 1/2
2/9	31 5/8
2/10	30 1/2
2/11	29 3/4
2/12	30
2/16	31
2/17	30 1/4
2/18	29 7/8
2/19	28 3/4
2/22	28 1/4
2/23	29 3/8
2/24	30 3/8
2/25	30
2/26	29 5/8
3/1	30 1/2
3/2	31
3/3	31 1/4
3/4	33
3/5	34 1/8
3/8	33
3/9	32 5/8
3/10	32 7/8
3/11	34 1/4
3/12	34 3/8
3/15	36 1/2
3/16	35 3/4
3/17	36
3/18	35 5/8
3/19	35 3/8
3/22	34 7/8
3/23	35 3/8
3/24	35 1/2
3/25	35 3/4
3/26	35 3/4
3/29	35 1/8
3/30	34 7/8
3/31	35 1/8
4/2	36 1/2
4/5	37 5/8
4/6	37 7/8
4/7	37 1/4
4/8	37 3/4
4/12	40 5/8
4/13	39 5/8
4/14	40 1/8
4/15	39 1/2
4/16	39 3/4
4/19	40 1/2
4/20	39 7/8
4/22	40 5/8
4/23	44 1/8
4/26	45 3/4
4/27	47
4/28	45 1/2
4/29	45
4/30	44 5/8
5/3	44 7/8
5/4	44 7/8
5/5	44 3/4
5/6	42 1/2
5/7	42 1/2
5/10	43 3/4
5/11	42 7/8
5/12	42 5/8
5/13	42 1/2
5/14	41 5/8
5/17	39 1/2
5/18	39 1/8
5/19	39 3/4
5/20	40 1/4
5/21	39 1/2
5/24	38 3/4
5/25	38 1/2
5/26	39 1/4
5/27	39 1/4
5/28	38 3/4
6/1	39 1/2
6/2	41 5/8
6/3	41
6/4	41
6/7	39 5/8
6/8	39 1/8
6/9	39 1/2
6/10	38 7/8
6/11	39 3/8
6/14	38 1/2
6/15	38 7/8
6/16	39 3/8
6/17	39 1/4
6/18	35 3/8

SCHEDULE A (cont'd)

DATE	CLOSING PRICE
6/21	34 1/2
6/22	34 1/2
6/23	35
6/24	34
6/25	33 1/2
6/28	34 1/4
6/29	35 1/4
6/30	35
7/1	35
7/2	35
7/6	34
7/7	33 1/4
7/8	29
7/9	29 3/4
7/12	27 1/2
7/13	25 3/4
7/14	27 1/2
7/15	26
7/16	25 3/4
7/19	26 3/4
7/20	26 1/2
7/21	26 3/4
7/22	26
7/23	25 1/2
7/26	25 1/2
7/27	25 3/8
7/28	25 1/2
7/29	25 5/8
7/30	25 3/4
8/2	25 3/4
8/3	25
8/4	22 3/8
8/5	22 1/4
8/6	22 3/8
8/9	21 3/4
8/10	22 5/8
8/11	24 3/4
8/12	25 1/2
8/16	26 3/4
8/17	27 3/4
8/18	27
8/19	26 3/4
8/20	26 3/4
8/23	27 1/8
8/24	27 3/8
8/25	28 1/8
8/26	28 1/4
8/27	28 3/4
8/30	28 1/4
8/31	27 3/4
9/1	26 1/8
9/2	27 1/2
9/3	28 5/8
9/7	28 1/2
9/8	27 3/4
9/9	27 3/8
9/10	26 7/8

SCHEDULE B

THE PURCHASE OF COMMON STOCK REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED AND MAY NOT BE SOLD OR TRANSFERRED, OR TRANSFERRED ON THE BOOKS OF THE COMPANY MAINTAINED FOR SUCH PURPOSE, UNTIL REGISTRATION UNDER SAID ACT SHALL HAVE BEEN EFFECTED OR IN THE OPINION OF COUNSEL SATISFACTORY TO THE COMPANY REGISTRATION UNDER SAID ACT IS NOT REQUIRED IN CONNECTION WITH SUCH PROPOSED SALE OR TRANSFER.

SCHEDULE C

THE SHARES REPRESENTED HEREBY ARE NOT REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE SOLD, TRANSFERRED OR OTHERWISE DISPOSED OF EXCEPT IN COMPLIANCE WITH SUCH ACT AND UPON AN OPINION OF CORPORATION'S COUNSEL TO THAT EFFECT.

TRANSCRIPT OF PROCEEDINGS

[Caption and Docket No. Omitted] Filed: August 19, 1974

New York, New York, February 11, 1974

Honorable Charles L. Brieant, District Judge

APPEARANCES OF COUNSEL:

For Plaintiffs: Michael C. Devine, Esq.

For Defendants: Martin P. Unger, Esq.
Milton Weiss, Esq.
Kenneth A. Raskin, Esq.

* * *

February 11, 1974

10:00 AM

* * *

* * *

evidentiary problem. If it should be, then the reservation and briefing, of course, would be acceptable.

THE COURT: All right.

MR. DEVINE: This may be a time consuming job. Would the Court prefer that we take a short recess and work with the reporter?

THE COURT: The clerk here marks exhibits and I would think if you have them in order, he could mark them very promptly for you.

MR. DEVINE: All right.

THE COURT: I am willing to take a recess for that purpose, if it's helpful.

Does anyone else wish to be heard before we go on recess?

MR. UNGER: Your Honor, one other matter, and that is with the stipulated facts in the pretrial order, paragraph five has a typographical error which I believe both counsel have agreed to and that appears on page two: the price of the Atron stock purchased by Mohawk, of the 375,000 Atron shares on January 7, 1969, was fifty cents per share.

THE COURT: All right. If that is agreed to, I will correct the original pretrial order.

MR. DEVINE: It's so agreed.

* * *

jb-lf 8

Honor. Mr. Wells is here. He will be the next witness for the plaintiffs. However, he is a hostile witness and I am --

THE COURT: If there is no application, it's perfectly all right with me. I like to inquire so that no one will be surprised later on.

MR. DEVINE: I have no objection to his staying.

I R W I N R. L E P O W, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEVINE:

Q Are you associated with Creative Capital Fund, one of the plaintiffs in this action?

A Yes.

Q What is your association?

A I am a general partner.

Q When did you begin as a general partner of that partnership?

A Approximately August of 1968.

Q Throughout the period from August, 1968, until the present time, have you been a partner of that partnership?

A Yes.

Q At the present time, what is the business of Creative

Capital Fund?

A It makes investments in -- well, it's not active at the moment but it did make investments in private companies who hoped to go public and also companies that were already public.

Q Was that the business of Creative Capital Fund in the period from the beginning of 1969 until the end of 1971?

A Yes.

Q Did there come a time in 1969 when Creative Capital Fund purchased common stock of Atron Corporation?

A Yes.

Q Do you recall when that was?

A I believe it was early in 1969, I think January of 1969.

Q Was the stock which Creative Capital purchased at that time restricted in any way?

A Yes.

Q What was your understanding at that time of the nature of the restrictions on the Atron stock which Creative Capital Fund purchased?

A Well, that -- I think that we bought it with the understanding that it was to be held for investment purposes, rather than for immediate resale. I think the stock had a

legend to that effect regarding the Security Act of 1933 or '34, I am not sure which.

Q How did the purchase bring Creative Capital Fund of Atron common stock about?

A It was -- the purchase was recommended to us by Pierre LeLandais, who was with a brokerage firm at that time and we had, I think, purchased some other things through him or through the firm.

Q Can you state briefly for the Court what it was that Mr. Le Landais told you or which you learned from other sources which formed the basis for this purchase?

THE COURT: That's sort of a double-barreled question, isn't it?

MR. DEVINE: Yes.

THE COURT: Why don't you separate it and see what Mr. Le Landais told him first.

Q Would you take first what Mr. Le Landais told you about the stock?

A Well, he recommended it. He thought we would, we might do well with it.

It was in an industry that at that time was, I think, doing well and popular in the computer field and also that they had hopes that the company would be going public not too long after we made our investment in it, which did

subsequently happen and that we, you know, hoped to get a good appreciation on the investment.

Q Putting aside what Mr. Le Landais told you, was there anything else but Atron which led to this purchase?

A No. I think I've covered it in the statement.

Q Did there come a time when you learned of a proposed merger between Atron and Mohawk Data Sciences Corporation?

A Yes. That was in early 1971, January or February of 1971.

Q Do you recall how that came to your attention?

A I am not sure. I think -- I know we received a letter in February, 1971, from Pierre Le Landais, stating that and stating his opinion about that but it's very possible, I think likely, that we discussed it on the phone or just prior to that, maybe in January of 1971.

THE COURT: With Mr. Le Landais?

THE WITNESS: Yes.

Q Mr. LePow, I show you Plaintiff's Exhibit 27 and I ask if that is a copy of the letter to which you just referred.

A Yes, it is.

Q Was the report which is attached to that exhibit also attached to the letter which you received?

A Yes, it was.

Q When you first learned of the proposed merger, what was your opinion of it as it would affect Creative Capital Fund?

MR. UNGER: Objection, your Honor. He is asking for an opinion of the witness.

THE COURT: Well, the question was, did he have an opinion and I suppose I would take his opinion subject to connection.

A Well, I actually didn't have one.

THE COURT: All right.

A At that time --

THE COURT: If you didn't have one, that's the answer to the question.

Q Did there come a time when you did form an opinion about the proposed merger?

A Yes.

Q Do you recall approximately when that was?

A Well, it was subsequent to this letter from Mr. Le Landais in that it started us having conversations regarding the good and bad of approving the merger. Sometimes between then and April of 1971, when the proxy material was sent to us regarding the merger, we decided to vote for the merger.

Q What were the reasons that you, on behalf of Creative Capital Fund, came to that decision?

A Well, there were -- the main reason was that we were to get free stock of Mohawk so that we could sell, you know, our investment and reap a good profit in it.

Q In the period from early 1969 through 1971, did you on occasion speak with Mr. Ludt and Mr. French about investment matters?

A As far as Mr. French, I am not sure, it's possible I did not. Mr. Ludt and I worked fairly closely together and we spoke to each other many times during that period.

Q In the period from the beginning of 1971 through the end of April, 1971, did you have occasion to discuss the proposed merger with Mr. Ludt?

A Yes, we did or I did.

THE COURT: Precisely who is Mr. Ludt?

MR. DEVINE: Mr. Ludt is a general partner of Coronet Fund, another of the plaintiffs in the action.

THE COURT: All right.

Q Did there come a time when you received a copy of the Atron proxy statement dated April 16, 1971?

A Yes.

Q Do you have before you Plaintiff's Exhibit 18? Is that a copy of the proxy statement which you received?

A I believe it is.

Q Did you read that proxy statement?

A Yes. Perhaps not every word but I think the substance of it.

Q Do you recall when it was that you read it?

A Yes.

Q When was it?

A I am sure shortly after we received it, in April of '71.

Q Did there come a time when you discussed the proposed merger in light of the proxy statement with Mr. Le Landais?

A Yes. We had a discussion, I believe on the phone, at the end of April, a week or two after receiving the information.

I think that answers the question, doesn't it?

Q Tell the Court what you recall being said in that conversation and by whom it was said.

A Mr. Landais told me he spoke to, I believe, Mr. Stoutenburgh, who was connected with Atron, about two things. I think the paramount thing that the conversation was about was that Ladenberg-Thalman, the brokerage firm who arranged the public offering for Atron, was unhappy about the merger or the price of the merger between Mohawk and Atron. I think

if I recall, because the price that the public stockholders had paid for Atron was -- they didn't feel that the price was fair, the exchange price was fair to those stockholders.

MR. UNGER: Objection, your Honor. I move to strike that testimony. It's all hearsay testimony.

THE COURT: Whether it's hearsay or not depends on in what capacity Mr. Le Landais was acting at that time. If he was acting for any defendant, I would take it.

Has it been stipulated as to what his capacity was for the defendants then? Was he a director?

MR. DEVINE: We do not contend that he was acting for Atron, your Honor.

THE COURT: How would it be binding on the defendants, then?

MR. DEVINE: We don't offer this testimony, your Honor, for the truth of the contents. We offer it only as Mr. LePow's statement of what he was told by Mr. Le Landais, in that it was a basis for his decision making with respect to the merger.

THE COURT: How could that be? Mr. Le Landais, a third party, told him that Thalman, a third party, was opposed to the price. It has been stipulated that later they withdrew their opposition, so I don't see how it could be binding on the defendants or form any basis for liability here.

MR. DEVINE: Your Honor, I do not believe that we have stipulated that Ladenberg-Thalman withdrew their opposition.

THE COURT: Maybe I misread it, then.

MR. DEVINE: Mr. Unger indicates that we haven't stipulated that there was opposition. I think that that is true also.

I believe that there is a contention by the defendants that initially there was opposition later withdrawn.

THE COURT: I'm sorry. I suppose on the issue of reliance, if that's relevant here, you can tell what he learned from Le Landais. I'll take it for that limited purpose.

A There was another aspect. I didn't finish.

THE COURT: Don't volunteer. Let counsel ask the questions.

Q Mr. LePow, you have told us part of your conversation with Mr. Le Landais and I would like for you to continue and tell us in addition whatever else was discussed between the two of you on that occasion.

THE COURT: I am taking this subject to connection as to these defendants.

A Well, it was about the Ladenberg-Thalman matter and also that they rediscussed or discussed us getting free stock

in the merger.

Q When you say "they," who are you --

A My understanding was that the conversation was between Le Landais and Stoutenburgh.

Q On April 30, 1971, did you believe that Creative Capital Fund would receive unrestricted Mohawk stock if the proposed merger was approved?

A Absolutely.

Q When did you first learn that the Mohawk stock to be received by Creative Capital Fund as a result of the merger would be restricted?

A I believe that was on May, the beginning of May, May 5th or thereabouts.

I guess that answers your question.

Q How was it that you learned that the stock of Mohawk was going to be restricted?

A I received a call from Mr. Ludt, the general partner of Coronet Fund. No, I'm sorry. I should correct that date. That's incorrect. I learned about it being restricted -- I think this is in reverse. I learned about it being restricted a couple of weeks after, you know, the call that I got telling me about selling the stock.

Can you go back because I think the dates are off here.

Q Let's try and get the chronology.

Subsequent to the effective date of the merger, April 30, 1971, did you have two or more telephone conversations with Mr. Ludt?

A Yes.

Q When was the first conversation?

A That was around May 5th.

Q What was said and by whom in that conversation?

A Mr. Ludt called me and told me that he had just put in an order to sell the Mohawk stock prior to him receiving the stock and he suggested I do the same.

THE COURT: When was this, now?

THE WITNESS: I think May 5th of 1971.

Q Did you follow that suggestion?

A No, I did not.

Q Why not?

A Well, that suggestion came about a day or two before -- I mean after there was an announcement in the paper about Mohawk's recasting their earning figures or changing their accounting methods and, obviously, this prompted Mr. Ludt to decide to sell, rather than waiting for delivery of the stock and I felt --

MR. UNGER: Objection.

THE COURT: I'll strike out the "obviously" but the

man can give his reason.

Q Give your reasoning without characterizing Mr. Ludt's thinking, if you can.

A Okay.

Since this news had come out, negative news, let's say, regarding the Mohawk figures, I felt that everyone else must have figured out the same thing and probably there was a deluge, I thought, of sell orders, perhaps, and I would wait until that deluge concluded before I would look to sell the stock. That was my reasoning.

Q When was your next telephone conversation with Mr. Ludt with regard to the Mohawk stock that had been or was to be received by virtue of the merger?

A I received another call from him within a week or so of that phone call on the 5th, telling me not to sell the stock because he had learned that the stock was restricted from sale.

Q Did he tell you how he learned that?

A Yes. He said that sometime after he sold it, when the brokerage firm who had sold it for him was expecting delivery, he got notice -- I guess from the bank or transfer agent -- that the stock was restricted and should not have been sold or could not be sold.

Q Was the Mohawk stock certificate which Creative

Capital eventually received legended?

A I don't think it was. I am not sure if we even got the stock in directly.

Q After your second conversation with Mr. Ludt, did you understand the Creative Capital Fund-Mohawk stock to be restricted?

A Yes.

Q And what did you understand to be the nature of the restriction on the Mohawk stock?

A The nature of the restriction? I assume similar to the restriction that was on the Atron stock that we had.

Q Prior to April 30, 1971, what did you plan to do, if anything, with the Mohawk stock to be received by Creative Capital as a result of the merger?

A Our intent was to sell the stock.

Q Following the merger effective date, April 30, 1971, did Creative Capital Fund place an order for the sale of the Mohawk stock which it was to receive? Let's say in the month of May?

A No.

Q What was the reason why a sell order was not placed in the month of May?

A Well, there are two time periods, time frames involved. I explained why I didn't sell it May 5th -- because

I felt it was the wrong time to do it under the circumstances.

I didn't sell it two weeks after that because I learned it was restricted.

THE COURT: How did you learn it was restricted?

THE WITNESS: From the second phone call from Mr. Ludt.

THE COURT: Did you make any attempt to verify whether Mr. Ludt was speaking authoritatively?

THE WITNESS: I had no reason to doubt it.

Q I show you Plaintiff's Exhibit 20 and ask if you have seen a copy of that letter before today.

A Yes.

Q Did you receive a copy of that letter shortly after May 26, 1971?

A Yes. I don't remember exactly when but I did.

Q Did that letter inform you that the --

THE COURT: If the letter is in evidence, it speaks for itself, doesn't it?

MR. DEVINE: Withdrawn, your Honor.

Q Prior to the merger, when you read the proxy statement, did you read the Mohawk financial statements which are included?

A Yes.

Q I ask that you look at pages sixteen and seventeen

of the proxy statement and tell the Court whether you read those two pages particularly.

A Yes, I read these pages.

Q Did you consider the financial information regarding Mohawk which is contained in the proxy statement to be important to your vote on the merger?

A I considered it important in that, you know, the value that the stock would have when we sold it would, you know, what value that would have.

Q On April 30, 1971, did you know that Mohawk subsequently would restate downward its 1970 sales and income figures?

A No.

Q On April 30, 1971, did you know that on Tuesday of the following week Mohawk would announce changes in its accounting practices?

A No.

Q If you had known on April 30, 1971, that on Tuesday, May 4, 1971, Mohawk would announce changes in its accounting practices which would cause downward restatement of its 1970 sales and income, would that knowledge have affected your vote on the merger?

MR. UNGER: Objection, your Honor. It's calling for a speculation.

THE COURT: It's not necessarily a speculation if the record clearly shows the nature of the statement of income. The man may tell what his judgment and opinion would have been, acting for his company or his fund.

You see, there are different kinds of restatements. The witness hasn't shown any familiarity with exactly what the nature of the restatement was.

Do you know what the nature of the restatement of income was?

THE WITNESS: Well, that it was restated downward.

THE COURT: In what way or for what reason or on what theory, if you know?

THE WITNESS: That they changed their accounting methods to do with leasing equipment rather than selling equipment. It was complex, but the effect was a downward effect.

Q I show you Plaintiff's Exhibit 23 which has been marked for identification and if you will look at the reprint which is the last of the reprints on that page, article reprints, the question is: before today did you see that newspaper article at any time?

A Yes.

Q If on April 30, 1971, you had known the information

contained in that article, would it have affected the vote of Creative Capital Fund on the merger?

MR. UNGER: Objection, your Honor. The article that the witness has in front of him is a newspaper article and there is no testimony that the information in that article is, in fact, the fact.

THE COURT: Well, that may be connected up later. I'll take it subject to connection. If the article was not released by defendants, it wouldn't be binding on them.

Q You may answer.

THE COURT: I think you really should address yourself as to what the actual facts of the restatement of the income is and then I will permit him to testify as to whether he as a professional money manager would have relied on such a restatement of income had he known about it before the meeting as the basis to vote differently. Of course, he is subject to cross examination as to whether he would have, in fact, done differently.

MR. DEVINE: May he answer the pending question?

THE COURT: Yes, subject to connection.

A The answer is, I don't know.

THE COURT: That's a good answer.

Let's go on.

Q Would you explain why it is that you don't know?

A Well, I would have to put myself back in that time and evaluate how large an effect this would have on the value of the Mohawk stock and then make a determination, since we were still getting free stock and I would have to determine what effect that would have at that time on our decision. It was a major factor but I don't know the decision I would have made.

MR. DEVINE: I have no further questions at this time, your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. UNGER:

Q What was Creative Capital Fund back in 1969?

A It was a limited partnership and investment company, I guess you would say.

Q Private limited partnership?

A Yes.

Q And you were the only general partner?

A No. Mr. Ludt was a general partner.

THE COURT: What was your function with respect to it?

THE WITNESS: My function was to make the investment decisions, buying and selling.

Q Mr. Ludt was a general partner of Creative?

A Yes.

Q Did you talk to counsel with respect to the announced merger of Atron and Mohawk?

A Not directly.

Q Between January and say April 15, 1971.

A No.

Q During that same time period, say January 29, '71, to April 15, '71, did you seek to sell any of your Atron stock?

A From January of '71 to April of '71?

Q Through April 15th of 1971.

A No.

Q You knew you couldn't sell that stock at that time, right?

A That I could not sell the stock?

Q Right.

A Because of the restriction, you mean, on the Atron stock?

Q Right.

A I believe that's true.

Q I ask you to take a look at Plaintiff's Exhibit 27 in evidence.

You received that on or about February 5th of 1971?

A Yes.

A Oh, I see, yes.

MR. DEVINE: It is not, your Honor, we have stipulated to it.

Q Let me direct your attention to paragraph 7A and B of that stock purchase agreement and also the so-called investment letter that's also part of that exhibit.

A Where would that be?

Q It's the one that starts off, "The undersigned hereby confirms its purchase" --

A Exhibit "C"?

Q Right.

I also ask you to look at Plaintiff's Exhibit 18 in evidence which I think is before you and ask you to tell me, after looking at those documents, what in Plaintiff's Exhibit 18 led you to believe that Mohawk was not going to enforce the obligation set forth in paragraph 7A and B and in your so-called investment letter which was part of Plaintiff's Exhibit 11 in evidence.

MR. DEVINE: Objection. Your Honor, he has not testified that the proxy statement led him to believe any such thing.

THE COURT: Well, he may so state in answer to the question, then.

A There was nothing in the proxy statement that led

me to believe it one way or the other.

Q Bearing in mind paragraph 7A and B in the investment letter that is part of Plaintiff's Exhibit 11, what other factors came to your attention or led you to believe that this agreement was not going to be enforced by Mohawk?

MR. DEVINE: Objection, your Honor. For one thing it calls for the witness to make a conclusion as to the enforceability of that agreement.

THE COURT: He hasn't really testified yet that he had reached a conclusion that the investment letter would not apply to his Mohawk stock. If he says that, then he may be asked what, if anything, in the letters he relied on to reach that conclusion.

Do you understand the question he just asked you?

THE WITNESS: I would like it repeated.

THE COURT: Please reframe it.

Q You were aware of the contents of Plaintiff's Exhibit 11, weren't you?

A Yes.

Q You were aware of that in April of 1971?

A Yes.

Q And you knew in April, 1971, that in order to sell the Atron stock that Creative owned it could do it in one of two ways -- it could be registered under the provisions

of the 1933 act or it could be sold under an opinion of Atron's counsel, isn't that right?

A Yes.

Q And, in fact, Creative had sold some stock under an opinion of Atron's counsel, hadn't it, some of it, prior thereto?

A Correct.

THE COURT: Because of changed circumstances or by sale to somebody else with the restriction?

THE WITNESS: By sale to somebody else with the restriction.

Q That was a sale to R. D. Goldberger Investment Company, wasn't it?

A Yes.

Q And you had obtained a letter of investment representation from Goldberger?

A Yes.

Q And Atron had permitted that sale, hadn't it?

A Yes.

Q Bearing what you have just said in mind, what led you to believe that the restrictions on transfer of the Atron stock would not appear on the Mohawk stock that Creative was going to receive on the merger?

A A few things. One was the conversations that I had

previously stated I had with Mr. Le Landais regarding the disposition of the stock. The other was, to my knowledge, this was not unusual, that I knew people who had investments in other companies who had sold private companies or smaller companies to larger listed companies and would receive free stock at that time.

Q And so you assumed you were going to be getting free stock because it happened in other situations?

A No. Because I told you I discussed it at length numerous times with Mr. Le Landais and Mr. Ludt regarding what stock we would receive.

Q Who was Mr. Le Landais working for at that time? Atron?

A No. He was working for the brokerage firm -- I think the same one or perhaps another one -- that recommended us to make this investment.

Q He wasn't working for Mohawk?

A Not to my knowledge.

Q How about MDS-Atron? Was he working for MDS-Atron?

A Again not to my knowledge.

Q But you believed Mr. Le Landais, what he told you?

A Yes.

Q I believe you stated that you read Plaintiff's Exhibit 18.

A Yes, I read it over.

Q I direct your attention to the top paragraph on page 5 and I ask you just to take a minute and read that.

That paragraph says, doesn't it, that your Atron certificates --

A Can you let me finish reading it?

Q Sure.

A Go ahead.

THE COURT: Don't paraphrase the exhibit. You may ask whether he read it before and what his understanding of it was at the time he read it but don't paraphrase it.

Q Was your understanding of that certificate at the time you read it that every four shares of Atron on an Atron's stock certificate were automatically one share of Mohawk when the merger became effective?

A That we would receive one share of Mohawk for every four shares of Atron?

Q No. That the Atron certificate as you are looking at it automatically becomes a Mohawk certificate.

A No. It says the conversion would be automatic. Is that what you mean? The conversion of the shares will occur automatically, it says.

Q Now, why don't you read the second sentence of that paragraph out loud? And then tell me what that means to you.

A "And without any further action on the part of the Atron shareholders."

Q Starting with the words, "Each certificate," the second sentence of that top paragraph on page 5.

A I see.

"Each certificate representing Atron common shares outstanding on the effective date of the merger shall thereafter be deemed to represent the number of whole shares of common stock of Mohawk into which the Atron common shares have been converted."

Q What did that particular sentence mean to you?

A Nothing different than the first sentence, that we were going to receive Mohawk shares for Atron shares.

Q What about the words, "Shall thereafter be deemed to represent"? What do those words mean to you in the context of that sentence?

A That the Atron shares no longer existed and the Mohawk shares do.

Q So, isn't it a fact that if you are holding an Atron certificate and that certificate is subject to some restrictions, your Atron shares are subject to some restrictions on transferability, that the Mohawk shares that you would be getting under that very language are subject to precisely the same restrictions?

* * *

* * *

THE COURT: I'll come back to that with you, gentlemen. Let's proceed with the cross examination.

MR. DEVINE: I think the number can be determined looking at page 15 of the pretrial order and also I think there are one or two other places which I could direct you to in the order which disclose that information.

THE COURT: It might be helpful the next time we have a recess to have a computation of how many total shares these plaintiffs had and what percentage it was of the voting shares which were required to pass upon the merger.

But let's go on. Go ahead.

Q Let me ask you to take a look at Plaintiff's Exhibit 18 again, page 6.

Did you read that page when you got that particular document?

A I am sure I passed over it, yes.

Q You received Plaintiff's Exhibit 18 before you voted on the merger, didn't you?

A Yes.

Q Did you look, when you got Plaintiff's Exhibit 18, at the Atron financial material that is included in that document?

A Yes.

Q You were aware that Atron had more than a million

dollar loss in its prior fiscal year, weren't you?

A I don't recall now but I was probably aware then when I read it.

Q They weren't doing too well?

A Are you asking me my opinion?

Q Was Atron going to be doing well, did it look like it, based upon your looking at their financial statements and what they were telling you?

A Well, I had other reasons to think they may do well, if you want me to expand on that.

It was a young company, so you can't judge a young company in my judgment the same way you judge an older, established company.

Q You were aware that Mohawk accounted for about 90 percent of Atron's sales and other revenues, weren't you?

A I recall that Mohawk was a big factor in the business of Atron, yes.

Q Did you read the proxy statement that Mohawk now had the right to manufacture the Atron machine that it had been buying from Atron?

A I am sure I read it through. I don't recall that now.

Q But if it's in Plaintiff's Exhibit 18, you read it?

A I am sure I read it, yes.

Q Let me direct your attention to page six again.

Were you aware when you read this document that Atron management felt that in order for it to survive as a company it would have to go into the end user market?

A I don't recall the survivor aspect. If it says it in here -- does it?

I think it says its future growth.

Q That's right. You are reading it right. That's the sentence.

A Yes. That's not to me the same as survival.

Q Do you know what the end user market is, Mr. LePow?

A No.

Q Were you aware at that time of what kind of financing would be required in order for Atron to get into the end user market?

A Exactly? No, no. Except I accept the fact that it says they would need financing to do it.

Q The stock market was on the way down in that period, wasn't it?

A Which period?

Q 1971, for these kinds of companies.

A I think in the decline of the market in '69 and '70 the computer companies were hit as heavily at least as the

other ones.

Q What about '71?

A Well, there was some recouping in the market. I am not sure exactly how the computer industry fared as compared to the other industries.

Q You were aware from reading Plaintiff's Exhibit 18 that Atron had substantially no other customers than Mohawk?

THE COURT: I think we have had that asked and answered, haven't we?

Q Isn't it a fact, Mr. LePow, that if Mohawk pulled away its business from Atron, that Atron would have nothing left but whatever its balance sheet shows?

A I don't know what they would have left or what prospects they had at that time. My opinion was that Mohawk wouldn't have done it because they were a very large investor in the Atron company.

Q But you were aware that Mohawk could do it and still manufacture the Atron machine?

A I don't even know that, whether they had a contractual relationship with Atron or not so I don't know the answer to that.

Q Why don't you look at pages 20 and 21 of Plaintiff's Exhibit 18?

THE COURT: I am not certain precisely where this

* * *

* * *

THE COURT: Frame another question.

Q You read the section under the words "Marketing" on page 20 and 21 of the proxy, the Plaintiff's Exhibit 18, at the time you got it, didn't you?

A Exactly those? I can't guarantee. There are 49 pages here, so I assume I glanced through it but I couldn't guarantee I read that specific --

THE COURT: Did you give any thought to voting no?

THE WITNESS: Yes.

THE COURT: What reasoning motivated you, if any, or what considerations did you give thought to in considering whether or not to vote no?

THE WITNESS: Maybe I should rephrase the answer. I didn't give consideration to voting no or yes. We just gave consideration to whether -- well, I guess once we gave consideration, your Honor, it was whether we should vote yes or not. The initial reaction was we didn't know until we examined what would happen to us.

Q Had you given any thought to, at the time you were considering how to vote on the merger, what the effect of a failure of the vote to carry the merger would be?

A The effect would be that they wouldn't merge.

Q What would be the effect with respect to the Atron stock that Creative owned?

A I would assume it would be as it was before the merger ever cropped up.

Q You couldn't sell unless you met either one of the conditions in the subject description?

A If the stock was registered by Atron or else we sold it under a letter of investment.

I think there is a third possibility, by the way, that you can get from the S.E.C. after a period of time. That would be the third possibility.

THE COURT: You are referring to a no-action letter?

THE WITNESS: I believe so, yes.

Q Creative bought its stock in January at a dollar a share, two dollars --

A A dollar.

Q Bought 42,500 shares at a dollar a share, right?

THE COURT: That's not in issue, is it? That's agreed to, is it not?

MR. UNGER: Yes, your Honor. I am just using it as a basis.

A The original purchase in January of '69?

Q Right.

A Yes.

Q Now, we have referred to a sale to R. D. Goldberger Investment Company.

How much did you sell that stock for?

A Yes, the stock had already reversed split by the time I sold it.

Do you want to clarify that first?

Q Sure.

A So we, therefore, paid two dollars a share by that time, since we only had half the shares left.

THE COURT: At a cost of two dollars a share at that time?

THE WITNESS: At that time.

THE COURT: How much did Goldberger pay you for the shares that were sold to Goldberger?

THE WITNESS: Approximately $10.

THE COURT: What was the market price, at that time, of unrestricted shares?

THE WITNESS: Higher than that.

THE COURT: By how much?

THE WITNESS: I don't remember.

Q You sold 5,000 of the after-split shares to Goldberger, right?

A Correct.

Q For about $50,000?

A Correct.

Q And that left you with --

A 16,250 shares.

Q Isn't it a fact that after that your goal in buying Atron was realized, that is, that you did get a pretty good appreciation in value?

A The goal for one part of it was realized, yes.

Q You eventually sold the remaining shares on the registration, didn't you?

A Yes.

Q You sold that for some $60,500?

A I think that is about right.

Q Approximately?

A Yes.

Q So, isn't it a fact that the total profit that Creative made on its Atron investment was almost $70,000?

A I haven't worked out the numbers but I'll accept that, it sounds about right.

Q So, isn't it a fact that you achieved your goal, you got a pretty good appreciation in value?

A Which goal are you talking about?

Q The goal that you testified to that you bought the stock because you wanted to get appreciation --

THE COURT: Let's go on to something else, it's argumentative and not in issue.

How much more cross examination do you have?

MR. UNGER: Not too much, your Honor.

Q With respect to the change in accounting, was it your testimony that your information with respect to that change came solely from that Wall Street Journal article that you referred to?

A No. We had discussed, I had had discussions also, with Mr. Le Landais around the same time and, I am sure, with Mr. Ludt, too.

Q Did you speak to anybody from Mohawk with respect to what that article said?

A No.

MR. UNGER: No further questions.

THE COURT: Any redirect examination of the witness?

MR. DEVINE: Two very short questions, your Honor.

REDIRECT EXAMINATION

BY MR. DEVINE:

Q In the time period from the beginning of January, 1971, through the effective date of the merger, April 30, 1971, you testified on cross examination, I believe, that it may have been possible for Creative Capital Fund to sell its Atron shares.

I would like you to enlarge on that and tell the Court under what conditions you could possibly have sold

during that time period.

A My understanding is that you could sell as I did to the Goldberger situation, under a letter of investment from counsel or, of course, that Atron would register our shares at a subsequent date or that I could, we could, after owning the stock a two or three year period and I think it was about two years or longer at that time, be free to sell through the S.E.C, through an opinion letter.

THE COURT: Is that all you need, the lapse of time?

THE WITNESS: My understanding was --

THE COURT: Or did you need a change of circumstances on the part of the seller to get a no-action letter?

THE WITNESS: I don't think anyone really knew all through these years what they would do. I know people who got them by a lapse of time, by a change of circumstance, there was no clear rule on it but the time seemed to be a factor -- I think to show your intent of holding it for a period of time. That was my understanding.

Q In the period from let's say March and April of 1971, as opposed to these possibilities of selling the Atron stock you then owned, Creative Capital Fund then owned, was the alternative possibility in your mind that you could sell Mohawk stock after April 30, 1971, in a New York Stock Exchange

transaction?

THE COURT: Hasn't he already told us that?

MR. DEVINE: I think so, your Honor. I wasn't sure whether that was clear after cross examination or not.

THE COURT: I'll let him answer.

A Well, it was not only that we would get free stock as a factor, we believed, but that it's easier to sell stock where there is a big market for it, than if the big blocks of stock came out in the over-the-counter --

Q With respect to the proxy statement, was there anything in it, as you read it, prior to April 30, 1971, which indicated to you that Creative Capital Fund would not receive freely transferable Mohawk stock?

A There was nothing either way.

MR. DEVINE: That's all I have, your Honor.

(Witness Excused)

THE COURT: We'll take a short recess, gentlemen.

(Recess)

(Defendants' Exhibits A through D received in evidence.)

(Defendants' Exhibit E through J marked for identification.)

(Defendants' Exhibit K and L received in evidence.)

(Defendants' Exhibit M marked for identification.)

* * *

* * *

the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEVINE:

Q Mr. Wells, what is your present employment?

A I am vice president and treasurer of General Dynamics Corporation.

Q Are you a director of Mohawk Data Sciences?

A Yes, I am.

Q When did you become a director of Mohawk?

A February, 1968.

Q Were you ever employed by Mohawk?

A Yes.

Q When did you begin as an employee of Mohawk?

A February, 1968.

Q During calendar 1970, were you an officer of Mohawk?

A Yes.

Q What office did you hold during that year?

A For the first approximately one half of the year I was vice president and treasurer and the second half of the year I was executive vice president and treasurer.

Q During calendar 1971, were you an officer of Mohawk?

A Yes.

Q What office did you hold during that year?

A Executive vice president and treasurer.

Q Did you hold that office throughout 1971?

A Yes.

Q During calendar 1971, was Richard Rifenburg an officer of Mohawk?

A Yes.

Q What office did he hold in that year?

A President.

Q Did he hold that office through the year to the best of your knowledge?

A Yes.

Q During calendar 1971, was a Mr. V. Johnson an officer of Mohawk?

A Yes.

Q What does the "V" stand for, if you know?

A I believe it stands for Virgil.

Q What office did he hold in Mohawk during 1971?

A He was chairman of the board of directors.

Q In April and May of 1971, were you, Mr. Rifenburg and Mr. Johnson the top officers of Mohawk?

A I would say we were several of the top officers of Mohawk, yes.

Q Did you three gentlemen compose the executive

committee of the board of Mohawk at that time?

A Yes.

Q In 1970, what was the business of Mohawk and you can be hopefully descriptive but brief.

A We were in the data processing business, making peripheral equipment.

Q Could you explain briefly for me and possibly the Court what peripheral equipment means?

THE COURT: Is their business stated fairly in exhibit 18?

MR. DEVINE: I believe, to the best of my knowledge it is. I have no dispute as to that.

THE COURT: Then let's go to something that is in dispute.

Q I would like to focus, Mr. Wells, on equipment which Mohawk leased in 1970. Can you tell us what the standard term of equipment leases was in that year, let's talk about 1970 fiscal year. I know that is slightly different from calendar 1970.

THE COURT: What was the fiscal year?

THE WITNESS: Twelve months ending July 31, in 1970.

A The equipment that was leased was leased under a lease agreement that was a preprinted form that was fairly

standard although as we leased equipment, the customer often times would want additional provisions and stipulations in the lease agreement.

Q Showing you the last two pages of Plaintiff's Exhibit 34 for identification, I ask whether excluding the typewritten portion of that document whether it is a true copy of the standard from of equipment lease which was in effect during calendar 1970.

A As far as I recollect, yes.

Q Was that form of lease also in effect during fiscal 1971?

A I would say generally yes. We made revisions of the leases from time to time and I am not sure when a revision would have been made.

Q Do you recall ever having referred to this type of lease as a cancelable-at-will lease?

A I may have. I think by its terms it is for a specific period of time and then is cancelable after a period of time, I believe with 90 days notice.

Q In fiscal 1970, did Mohawk institute a program of selling to nonaffiliated third parties equipment which had been leased prior to the sale?

A Yes.

THE COURT: You mean selling it subject to lease?

Q Were these sales subject to the outstanding leases on the equipment being sold?

A Yes.

Q You have in front of you Plaintiff's Exhibit 34, still, I believe, and I ask whether that agreement is a true copy of a sales agreement which was entered into by Mohawk in 1970, fiscal 1970.

THE COURT: By fiscal '70, you mean the year ending July 31, 1970?

MR. DEVINE: Yes.

A As far as I can tell, it is a copy.

Q Is that agreement, which is in front of you, which is Plaintiff's Exhibit 34 for identification, similar in most substantive respects to other sales agreements entered into by Mohawk in fiscal 1970?

MR. UNGER: Objection, your Honor. I don't know what substantive, what the language means.

THE COURT: I don't either but I think the witness could probably tell us whether this is a representative or typical lease of the sort that Mohawk entered into. Is that what it is?

MR. DEVINE: Yes, and also sales agreement. This is the agreement regarding sale of the equipment which had previously been leased.

A I would say generally, yes, but each of these agreements were, in most cases, negotiated with different parties and these parties and their legal counsel wanted certain deviations made.

There were different terms, length of terms and things like that that did vary and whether that is substantive, substantial change I don't know but, generally, there was an agreement such as this.

THE COURT: And you treated them all the same, did you, from a bookkeeping point of view.

THE WITNESS: Yes, sir.

THE COURT: Regardless of what minor or major alterations the customer had asked for and obtained?

THE WITNESS: Yes.

THE COURT: And this sale, is that to a factor or somebody? Is that what that is?

THE WITNESS: This is a sale to a third party. In every case these were companies engaged in the leasing of equipment.

Q Pursuant to the agreement which is in front of you, Plaintiff's Exhibit 34, and to other agreements of that nature, did Mohawk continue to collect the rents received from the parties leasing the equipment?

A We agreed under terms of the sales agreement to act

as agent in billing the lessee and collecting the rents and remitting them to the third party leasing company.

Q So that after the rents were collected from the lessees, those rents were transmitted by Mohawk to the purchasers under agreements of this kind, is that correct?

A Yes.

Q If rents were not received by Mohawk, was Mohawk nevertheless required to itself pay the rents to the third party purchaser of the equipment?

A Generally we remitted these rents monthly in one lump sum and --

THE COURT: I think the question is whether you were required to make remittance notwithstanding the fact that your user might not have paid his rent.

A We were required to make the collections and to pass on the rents.

Now, as I recall the contract, we were not required to pay the rents if we didn't collect it.

MR. DEVINE: Your Honor, can we approach the Bench for a moment?

THE COURT: If you want the witness excused, I'll excuse the witness and you may be heard on the record.

Is that the problem?

MR. DEVINE: I think it would be helpful, yes, this

is something that may recur.

THE COURT: Mr. Clerk, would you escort the witness to the witness room, please.

(The witness left the courtroom.)

THE COURT: You may be heard in open court.

What is the problem?

MR. DEVINE: This witness obviously is a hostile witness; he is a director of a defendant.

THE COURT: You see, I don't see the "obviously." It appears to me that the man is attempting to answer you truthfully and completely. If he is mistaken in some regard, you can confront him with it and call his attention to whatever will require him to change the answer.

But I don't find him evasive or hostile and I think the man intends to tell the truth. If what he says is incorrect, why don't you stipulate on the record as to what the true factor is.

MR. DEVINE: This is what I wanted. I consider him hostile in a technical sense but I don't mean to imply that I suspect him to be untruthful, at least not to this point.

THE COURT: I think he is answering your questions in a courteous and proper manner and if he is mistaken in his answer, you may either stipulate with your adversary as to

what the fact is or perhaps you can refresh his recollection, if he has testified incorrectly. I don't think he shows any motive to lie.

What's the difficulty with the answer?

MR. DEVINE: I think the contract discloses that Mohawk was obligated to pay the rents.

THE COURT: If so, it's in evidence and it speaks for itself.

Do you agree with that, Mr. Unger?

MR. UNGER: Yes, sir.

THE COURT: All right. Let's not ask the witness things that are already in the record.

MR. DEVINE: That's why I asked for the conference, because I don't want to cross examine him to the extent that it's not necessary.

THE COURT: You may bring him back.

W A Y N E W E L L S, resumed.

THE COURT: The character of the lease may depend in some degree on whether that is the understanding but if the counsel are clear that that is what it is, then that's sufficient for me.

You may continue.

DIRECT EXAMINATION CONTINUED

BY MR. DEVINE:

Q For how long a period of time after the sales of leased equipment, previously leased equipment, did Mohawk continue to pay over the rents to the buyer?

A We continued to pay them over on a monthly basis.

Q For how long a period of time did that arrangement go on?

A You mean the contractual arrangement?

Q Yes.

A I think it varied as between contracts. The one I am looking at now, I believe, was a sixty-month period.

THE COURT: Was that machine leased on a sixty-month period to the user before it was sold?

THE WITNESS: No, it was not.

Q If during the period that the equipment was on lease and during the same sixty-month period that Mohawk was required to pay over rents, if the lease was terminated, did Mohawk continue to be obliged to pay rents to the purchasers of the equipment?

A If the lease was terminated and the lessee returned the equipment or we took back the equipment, we were required to do certain things and, according to the contract, and one of these was there were -- I am looking here at four or five alternatives.

Q Was the net effect of those alternatives for Mohawk

to continue to pay the rent to the purchaser of the equipment?

MR. UNGER: Objection, your Honor. The contract speaks for itself as to what the liabilities and obligations of the parties are.

THE COURT: Perhaps it does but I think the witness may be asked whether that, in fact, was done.

Is that what was done? Did machines come back before the end of the sixty-month period?

THE WITNESS: Yes, your Honor.

THE COURT: What did you do? Did you have a policy or practice with respect to such machines during 1971?

THE WITNESS: That's right. We did one or two things. We either substituted -- we either placed that equipment on rent with a new customer or we substituted an item of equipment that was on rent.

Q In no event did the buyer of the equipment suffer any loss of rental income during that five-year period, is that correct?

A Not as far as I know, that's right.

Q Is it fair to say that the overall effect of this lease and sale arrangement was a financing device?

A I think you are going to have to clarify as far as what you mean by financing device.

Q Well, have you, to your knowledge, ever described it as a financing device?

A I am not sure. I may have.

THE COURT: Well, the motivation, what was the motivational purpose for entering into the sale to the third party?

THE WITNESS: There were two motivations. One, it did generate cash to the organization --

THE COURT: It permitted you to discount your future rents, isn't that right, take them down ahead of time?

THE WITNESS: You might. You might characterize it as that.

THE COURT: What was the other?

THE WITNESS: The other motivation was to, I can go into a long dissertation, but it's to balance our sales and lease ratio because we were moving into a period because of high cost of money, where customers were tending to accentuate the lease side of the business as opposed to the sales side.

This was particularly true in early part of our fiscal year 1970 because of circumstances in Europe.

MR. DEVINE: Your Honor, at this point I would offer Plaintiff's Exhibit 34 for identification in evidence.

MR. UNGER: Your Honor, I have no objection to the offer of the document provided it's taken for whatever

that particular document says and not for whatever any other agreement between Mohawk and any other third party leasing company says.

THE COURT: Well, I would take it as being illustrative of the leasing and sales practice which I understand that the company had at or about that time, that's what this witness has indicated to me, that they had a uniform practice from a bookkeeping point of view, where they sold a lease which they had entered into with a customer even though that customer had different provisions or altered provisions in his lease, that they treated them all alike, isn't that so?

THE WITNESS: It's essentially so, your Honor.

THE COURT: I would take it as illustrative of what his transactions were and the amplification from his testimony that he in effect factored these leases to put them in ordinary language.

That's really what you did, isn't it?

THE WITNESS: We didn't regard it as that, sir.

THE COURT: What did you regard it as?

THE WITNESS: We regarded it as making a sale to the third party leasing company.

THE COURT: But you were holding the third party leasing company harmless from any loss in rent by reason of a turnback of the machine before the sixty months had expired,

isn't that so?

THE WITNESS: That's right. We agreed to substitute or to release the equipment.

THE COURT: And if you had not been able to do either of those things you would have paid, isn't that so?

THE WITNESS: I think we probably would have paid, yes.

THE COURT: Well, I'll take the exhibit in evidence.

xxx (Plaintiff's Exhibit 34 received in evidence.)

THE COURT: At the end of the sixty-month period, did this machine have any value?

THE WITNESS: We hoped that it would and --

THE COURT: Who got the value?

THE WITNESS: Well, there was a sharing between the third party lessor and MDS.

Q During fiscal 1970, were the proceeds of sales of equipment which had previously been leased accounted for by Mohawk as 100% income at the time of the sale?

A They were accounted for as sales just like any other sale was accounted for.

Q The full sales price was taken into income, is that correct?

A The full sales price was taken into revenues, yes.

Q Were sales of this kind accounted for in the same

way in fiscal 1971?

A Yes, in the first two quarters of 1971, they were.

Q In fiscal 1971. Why don't we pin this down to the quarter at this point.

When did the fiscal 1971 year of Mohawk end?

A It ended in April 30, 1971. We changed our year to a new year ending.

Q Throughout fiscal 1971, did Mohawk continue to account for sales to nonaffiliated third parties in the same way as it had in fiscal 1970?

A Well, we have two different bases of accounting. One, we continued in the first two quarters of 1971 to account for them similar to 1970. In the third quarter or for the full year, fiscal 1971, we changed our method of accounting and accounted for them differently.

Q Well, did you make this change in accounting during the third fiscal quarter of 1971?

A We made it as a part of the closing of our books for the fiscal year.

THE COURT: What was the precise change you made?

THE WITNESS: We discontinued accounting for these transactions as sales and accounted for them under the operating method whereby we accounted for them as if the transaction had been alone and we continued to bill the

customer account for the rental of the equipment just as we did in any other equipment.

Q I would like to try to understand your last few answers and I admit that I don't --

THE COURT: Doesn't he have a statement for the shortened fiscal year ending April 30th?

MR. DEVINE: Yes.

THE COURT: Doesn't that have a note on it telling what they did and what change they made?

MR. DEVINE: Well, your Honor, there is a note and it says something. Now, as to whether or not that is adequately descriptive is in part an issue in this case and --

THE COURT: Well, that was issued after your people had voted, wasn't it?

MR. DEVINE: That note was, yes, but there was a note in the proxy statement which was different and, of course, that is part of the case.

THE COURT: Why don't you confront the witness with the respective notes and ascertain whether they fully and fairly state what, in fact, took place.

MR. DEVINE: Well, if your Honor will bear with me --

THE COURT: All right. You may proceed.

Q During fiscal 1970, did you believe that the method of accounting for sales of this kind which was in effect during that year was proper as long as the lease termination rate was not excessive?

A Yes, we did and so did our public accountants and filings with the Securities and Exchange Commission.

THE COURT: Did you carry a reserve for premature terminations?

THE WITNESS: No, we did not.

Q When Mohawk began making sales of leased equipment in fiscal 1970, at what rate did the company expect leases on that equipment to terminate?

A We expected a very minimal termination.

Q Was the expectation described in a number percentage at that time?

A Not in a percentage. It would have been a small percentage but it wasn't, as far as I know it was not quantified.

Q Can you give a range as to what the "small" meant at that time?

A I would think someplace less than ten percent, it would be in the area of small.

THE COURT: But you booked no reserve whatsoever of the ten percent, is that right?

A That's right.

Q During fiscal 1971, did you receive regular reports on the rate of lease terminations?

A Yes, I did.

Q Who prepared those reports?

A As I recall, they were prepared by our marketing department and were also reviewed and were presented by our budget department.

Q How often were reports of that kind prepared?

A They would be prepared, I think, monthly although it could have been on a quarterly basis. At least quarterly.

Q To whom in the Mohawk officer group, officer-director group, were these reports distributed on a current basis?

A Most of the senior management of MDS.

Q Did that include Mr. Johnson?

A I think it did although I am not sure that it included Mr. Johnson.

Q Did it include Mr. Rifenburg?

A Yes, it did.

Q During fiscal 1971, did you discuss the rate of lease terminations with any other officers of Mohawk?

A Yes, I am sure I did.

Q Did you discuss the rate of lease terminations at any board meetings of Mohawk during fiscal 1971?

A Yes. It was a subject of -- it was a matter of concern and a subject of discussion at probably every board meeting.

Q What was the nature of the concern?

A Well, the fact that the equipment was not staying on rent for as long as expected and the fact that a great deal of effort had to go into releasing the equipment, which was an expense and also took up some of the demand for new equipment.

Q During fiscal 1970, did the rate of lease terminations exceed Mohawk's original expectations?

A If they did, it was toward the end of 1970. I can't pinpoint it.

Q In fiscal 1971, did the rate of lease terminations exceed Mohawk's original expectations?

A Yes, they did.

Q How much, in fiscal 1971, did the rate of lease terminations exceed expectations?

A I find it difficult to quantify but it was probably in the area of -- lease terminations were probably getting to the area of 20, 25 percent.

Q Do you recall during what portion of fiscal 1971 lease terminations began to reach that point?

A No, I don't recall.

Q Did there come a time in fiscal 1971 when you personally, rather than Mohawk as a company, began to consider a change in the method of accounting for the proceeds of sales of leased equipment?

A Will you repeat the question? I didn't get the first part.

(Record read)

A Yes. I began to give it some thought toward the end of April, 1971.

Q Was this reconsideration of the method of accounting occasioned in whole or in part by the higher rate of lease terminations than had previously been expected?

A Yes.

Q Did any other factor contribute to this reconsideration?

A Yes. In the history of this -- the accounting for similar transactions, this had been or had the approval of the accounting profession and as we moved into 1971, we were informed that the accounting profession was beginning to look toward a different method of accounting for this, using the so-called operating method and we were advised by our accountants that were familiar with the deliberations of the accounting principles board and other parts of the accounting profession that they might be requiring a different form of accounting

for these transactions.

Q I think you may have done this briefly earlier but would you describe what the so-called operating method of accounting was?

A The operating method was an accounting method whereby you in effect disregarded the legal aspects of the transaction, that it was a sale, and accounted for it as if the company had continued to own the equipment and that the rents were taken into revenue as they were billed and the equipment was depreciated and the proceeds received from the purchaser were handled and amortized as a loan.

Q Is the phrase "operating method" one which you coined in connection with Mohawk's operations or is that a generally accepted accounting phrase?

A I believe it's a phrase used generally in the accounting profession. I did not coin it.

Q Is it fair to say that the effect of the alternative method of accounting for transactions of this kind would be to report less income in the year of the sale?

A Yes.

Q During fiscal 1971, was there a change in the terms of the sales agreements regarding previously leased equipment, and I am referring specifically to a change in the manner in which Mohawk received the sales proceeds.

A Yes. In fiscal 1971, we entered into a transaction whereby we received a down payment from the party purchasing the equipment and received the balance of the proceeds over a period of time.

Q Did Mohawk continue to record the full sales price as 100% revenue at the time of the sale although it was not a hundred percent cash sale?

A Yes. We continued to record that sale just like any other sale that we have, where our part of the proceeds is in the form of a note as opposed to cash.

Q During fiscal 1971, was the firm of S. D. Leidesdorf the independent auditors for Mohawk?

A Yes, they were.

Q During fiscal 1971, did you discuss with anyone from Leidesdorf Mohawk's method of accounting for sales of leased equipment?

A Did you say -- what was the time period? I didn't get it.

Q Fiscal '71.

A Well, it was a subject that was discussed with the accounting firm. Yes, I did discuss it with them.

Q With what people did you have these discussions? Can you remember their names?

A Generally my discussions were with the two partners

that handled our account, Mr. Richard Wise and Mr. William Burke.

Q Both of those gentlemen were partners of S.D. Leidesdorf, is that correct?

A Yes, they were.

Q Do you recall when in fiscal 1971 you first discussed this subject with either of those gentlemen?

A What subject are you referring to?

Q The method of accounting for sales of previously leased equipment.

A No, I don't recall, you know, when I first discussed it with them. As I say, it was an item that was discussed from time to time and it could be, could have been very early in the fiscal year.

Q Do you recall specifically an occasion when Mr. Burke questioned the appropriateness of this method of accounting?

A Yes, and I think I know what the conversation you are referring to is.

Mr. Burke raised this question, I believe, at a luncheon meeting that Mr. Burke and Mr. Wise and I had. I would have said it was in February or March and Mr. Burke's main concern was that, of whether we were handling the transaction right in, properly in view of the fact that we

were only getting -- getting a 25 percent down payment.

This was discussed at that meeting, at a later meeting and, then, one day, I received a call, telephone call from Mr. Wise and he asked or said that they would like to come over and discuss it further and they would like to bring Mr. John McClare. Mr. McClare was their senior technical partner and had been formerly chief accountant of the Securities and Exchange Commission.

I obviously said we would be pleased to discuss it and I believe late in March, I believe the date was March 29th, Mr. McClare, Mr. Wise and Mr. Burke came to our offices at 20 East 46th Street and met with Mr. Ablove, Philip Ablove, who was secretary and general counsel for our company, and an employee and myself, to discuss this matter.

We had a lengthy discussion and Mr. Burke outlined his position. I took the position that these sales were similar to sales that we had made in the past, we were receiving a significant payment, down payment. We had the payment as collateral and so we were -- we felt right in recording these as sales. I think I compared them to other sales that we had made to customers whereby we permitted them, I believe the payment, down payment was 20%, and allowed them to pay the balance over a four or five year period, similar

to these, so I didn't think this was different.

And, after some discussion the three partners from Leidesdorf indicated that the accounting we were following was proper and, as I recall, the only comment made by Mr. McClare, he pointed out that the accountants were doing a lot of thinking about this matter and we might look forward to, in the near future, a change, a dictate by the accountants that transactions like this might have to be changed.

He went on to say that he could not say what the final decision would be and whether these transactions would be covered but he did mention that he was a member of the accounting principles board, which is the senior board of accountants, and he mentioned that these discussions were going on and he thought that very well the accounting could change but the meeting concluded with them telling us that our accounting for these transactions in fiscal 1971, was proper and, you know, was consistent with what we followed in 1970.

At this meeting, I remember one other thing being mentioned and it was mentioned late in the meeting, after they had told us that the accounting was proper -- that we were seriously considering discontinuing sales, this type of transaction, during or in periods after the current fiscal year.

THE COURT: You told them that?

THE WITNESS: I told them we were seriously considering discontinuing.

THE COURT: Did you tell them the reason why you were seriously considering discontinuing?

THE WITNESS: Yes. The main reason was that these sales were impacting our rental population and our growth in rental and we felt the security analysts and the people that followed our company were sufficiently sophisticated to realize that the important thing was a growth in the rental base as opposed to the growth in the, or a sales and lease ratio or something like that, and we felt that in the long term interest of MDS it was desirable to build our rental base.

Q I believe you described two meetings in that answer and I think in each meeting you referred to Mr. Burke stating his position.

Would you tell us what Mr. Burke's position was?

A Yes. I thought I did. I am sorry.

THE COURT: I am sorry. I don't know which two meetings. All I have is a meeting late in March, probably March 29th.

Q Didn't you say that in February or March, you weren't sure which, you had a meeting or discussion with Mr. Burke and

Mr. --

A And Mr. Wise, luncheon meetings leading up to the meeting on March 29th.

And Mr. Burke's position, and I thought I made it clear but to say it again, Mr. Burke's position was that the transactions, as between 1970, when we received full cash at the time we made the sale, should be -- our 1971 transactions which were based on a down payment and a payment over a period of time subsequent, these two transactions should be accounted differently and he questioned our accounting for the transactions in 1971.

Q He did that at the first so-called luncheon meeting and then subsequently --

A At all three -- from the luncheon meeting on, whenever we discussed this matter, Mr. Burke stated his position and that, being that was his position.

Q And it was after the luncheon meeting that someone from S. D. Leidesdorf called Mohawk or called you and suggested a March 29th meeting, is that correct?

A It was either Mr. Wise or Mr. Burke. And they were in -- they were present in any previous meeting we had.

Q Mr. McClare was the additional party present at the March 29th meeting, is that correct?

A That's right.

Q At either the luncheon meeting or the March 29th meeting, did Mohawk discuss with any of the Leidesdorf people the rate of lease terminations which was occurring?

A I don't know that we did. I don't recall.

Q Do you know whether in this February-March, 1971, period, S. D. Leidesdorf was aware of the rate of lease terminations?

A I don't know.

Q At either the luncheon meeting or the March 29th meeting, did you or anyone representing Mohawk discuss with the Leidesdorf people the possible change in Mohawk's fiscal year?

A I am not sure that we did, although it's my recollection that that had been discussed with them previously and by the date of March 29th, we had pretty much made a decision to change our fiscal year.

Q The particular question I think I am asking there is whether S. D. Leidesdorf on or before March 29th was aware that that decision had pretty much been made.

A I think the answer is yes.

Q When was that decision to change Mohawk's fiscal year made to the best of your recollection?

A Sometime during March. I know the matter was discussed at the March board of directors meeting as I recall,

the outcome of that meeting was, the concensus of the meeting was that if the senior management, the executive committee deemed this desirable, that they should go ahead and take such steps as they -- as was necessary to effect the change in the fiscal year.

Q Did the Mohawk executive committee in fact make the decision to change the fiscal year?

A Yes, they did.

Q Was that done at that formal meeting?

A I am not sure.

Q You are sure, however, that it was done during March of 1971, is that correct?

A That's right.

Q During March of 1971, did you and Mr. Rifenburg discuss the change in Mohawk's fiscal year?

A Yes, I guess we did.

Q Before I go too much further, why don't you state again quickly what that change in fiscal year actually was, from what end to what end?

A The fiscal year was changed from July 31st to April 30th.

Q And the result of that was that during fiscal 1971, the fiscal period would be nine months, rather than twelve, is that correct?

A That's right.

Q Do you recall the substance of your conversation with Mr. Rifenburg regarding the change in Mohawk's fiscal year?

A Well, this was not a decision that was -- where we sat down and said, you know, this is a new matter, because this had been a matter for discussion over a period of three or four years and we particularly or our general manager in charge of our European organization, Mr. Otto Stitz, had been insistent that a change be made to move this out of the summer months, where July fell, and move it into a better period, and he felt that the April 30th was a much more desirable period.

In addition, as a part of that decision, it was a fact that MDS had a new product, the system 2400 that it expected to have a significant impact upon the revenues and sales and that this would be a good period to end the fiscal year.

There were many other considerations but those were some of them.

THE COURT: Many other considerations?

THE WITNESS: Yes.

THE COURT: What were the many other considerations?

THE WITNESS: The fact that there was a recession

in the data processing business and this had been reflected in the earnings of Mohawk and had been a point that the earnings had been delinquent and the feeling was, you know, it was a good year to get it behind us, close out the books.

There was the acquisition of Atron that would be reflected in the fiscal year and the earnings would have to be restated for that acquisition and these were other factors.

THE COURT: All right.

Q Was the method of accounting for sales of leased equipment part of the discussions regarding the change in the fiscal year?

A Not that I recall.

Q Was the subject of the method of accounting for sales of leased equipment raised at the March, 1971, board meeting of Mohawk?

A No.

Q Was the practice of selling equipment that had previously been leased discussed at the March, 1971, board meeting of Mohawk?

A As I recall, each sale was authorized and approved by the executive committee and was subsequently affirmed by the full board as part of the executive committee actions.

There may be some cases where it went directly to the full board as a part of the -- because of the timings,

perhaps.

Q Did the board in March of 1971 discuss the possibility of discontinuing sales of that variety after fiscal 1971?

A I am not sure.

Q Was the consideration of discontinuing sales of that kind after fiscal 1971 part of the reasoning behind the change in the fiscal year?

A Not that I recall.

Q As it worked out in fact, was the discontinuance of those sales done as of the close of 1971 fiscal year?

A That's right.

THE COURT: Was that accomplished by resolution of the board of directors?

THE WITNESS: The discontinuance?

THE COURT: Yes.

THE WITNESS: I am not sure, your Honor.

Q Was it accomplished by a resolution of the executive committee?

A I'm not sure. I mean, it's my -- to the best of my recollection, the sale was authorized by the executive committee and they approved each sale and my understanding was that there were no more sales to be approved and there was no action taken.

However, at the June meeting, which was still before

or within the quarter following the close of the 1971 fiscal year, you know, the entire matter was discussed, so they were aware of it before the end of the quarter.

I might say here again it was fairly well public knowledge when we entered into this type of transaction, that it would not be done for a long period of time but would be considered from time to time.

Q Well, the termination date of this practice was not public knowledge, was it?

A Not that I know of.

Q When did Mohawk first announce that it had decided to change its fiscal year from 1971 and close it after nine months, rather than twelve?

A Would you repeat the question?

Q When did Mohawk first publicly announce that it had decided to change its 1971 fiscal year?

A I think the first public announcement was probably made on May 4, 1971, although it could have been made previously.

Q When you say could have, you mean it could have been as a business matter or you are not sure and maybe it was?

A I am not sure, now that I think about it -- I don't think it was. I think it was May 4, 1971, when it was publicly disclosed.

I am getting confused because you asked the question

earlier. We had disclosed, and this may be at variance with my previous answer, we had disclosed publicly that we were planning to discontinue sales to third parties. I believe that was done in connection with a discussion with a representative of Reuters News Service about the middle of either March or April, I've fogotten which.

Q We'll come to that in a minute and maybe we can straighten it out.

I am interested in knowing now, why was it when the decision to change the fiscal year had been made during March of 1971, that it was not publicly announced until after April 30, 1971?

A We didn't consider it a significant factor, when you change your fiscal year because we were reporting on a quarterly basis, the stockholders were used to looking at quarterly statements and when we closed our fiscal year we felt had very little significance.

Q Do you think that had it been announced during April, let's say, of 1971, that Mohawk would have received inquiry from various securities analysts, reporters, investors, shareholders, regarding the reasons for this change?

MR. UNGER: Objection, your Honor. He is asking the witness to speculate.

THE COURT: I am afraid it is speculative. The

witness has already gone on record as saying that he felt the change of fiscal year was of very little significance.

Q Mr. Wells, did you think that the reasons for changing the fiscal year were also of little significance?

A Well, as I recall, most of the reasons were public information. I don't have a copy of some of our quarterly reports but I don't think -- I think we pretty much discussed practically every reason that went into our consideration of changing the fiscal year.

Everyone knew we had the system 24 coming along. Everyone knew that we had the acquisition of Atron, they knew and God knows we told them many times that it was a lousy year in the data processing industry.

These were all things that were public knowledge.

Q Well, was it public knowledge that Mohawk felt that the year was of a kind that made it appropriate to put it into a short fiscal period and move on? Was the public aware of that?

A I don't know why they wouldn't be. I mean because as I say, we disclosed everyone of these reasons in our public reports and let me say one other thing -- it was no great secret that we were going to someday change fiscal years because anytime we used to have discussions with security analysts and other people, particularly if Mr. Stitz, our

European general manager were present, he would quote very -- at length why he thought it was a lousy time to close the year, in July, and I bore most of the brunt because I was the one that recommended it originally and, you know, the security analysts acted like, well, who cares, and that's the way we regarded the whole transaction.

THE COURT: How much more do you have for this witness?

MR. DEVINE: Well, your Honor, I would think certainly over an hour.

THE COURT: You do?

MR. DEVINE: Yes.

THE COURT: Well, let's move along.

Q Mr. Wells, you have in front of you Defendant's Exhibit T, I believe, which is a, I think, a reprint of a so-called Reuters' report or a Reuters' tape.

THE COURT: Has it been agreed that this is received in evidence?

MR. DEVINE: Yes.

THE COURT: Then it shows he made the statement at or about the time it bears date, isn't that correct? What are you going to ask?

MR. DEVINE: Whether this refreshes his recollection as to the date in April upon which a public announcement was

made by Mohawk.

MR. UNGER: Objection. Respecting what?

MR. DEVINE: Respecting the contents of the announcement.

THE COURT: Well, can't you ask the witness whether he made the announcement that is comprised in exhibit T and whether exhibit T fairly reflects what he said at that time.

MR. DEVINE: Yes, your Honor.

THE COURT: Is it in issue? Is there any argument about it?

MR. DEVINE: The only reason I go into this, your Honor, is that the witness earlier testified about this but he was uncertain as to the date and I think this may refresh his recollection and I would like to ask him one or two things about it.

THE COURT: You see, one or two things could have happened. Either Reuters faithfully reports a public announcement wh' h this man made on April 19th or it does not and if it does, if the exhibit has been received in evidence, I would leave it right there.

If it does not faithfully report what he said, then I would point out through questions how it's mistaken but if this is a true report of what Mr. Wells told Reuters on that date and it's already been received in evidence, I

wouldn't push it any further.

MR. DEVINE: May I ask just one or two?

THE COURT: Certainly.

Q At the time that this announcement was made, given to Reuters, did Mohawk consider including in this announcement the fact that it had decided to change its fiscal year?

A This -- let me say this --

THE COURT: Can't you answer that yes or no? Had your committee or yourself or any of the other officers considered including that additional fact in exhibit T?

THE WITNESS: Let me clarify one thing -- this was not a public announcement made by MDS. It was not an announcement where we put something and carefully considered putting something in the hands of the media or the wire service in this case.

This stemmed from a telephone call from Mr. Dobson and soliciting information and basically what I did was answer the questions that Mr. Dobson put to me and I did not attempt to write a long report about everything that we were doing.

Now, let me tell you this -- if Mr. Dobson had asked me or frankly, if I had even thought about it, I would have had no problem indicating we were considering changing our fiscal year and I think it would have been lost in the

small print and we would have gotten on with it.

Q In the period prior to March 31, 1971, when you discussed with Mr. Rifenburg the possibility of changing Mohawk's fiscal year, did you in those same discussions discuss with him the possibility of discontinuing sales of the kind we have been talking about?

A Yes. We discussed it then and we discussed it before this. We had certainly discussed it before the date of this announcement which I see is April 19th but we had discussed it, I suppose it was an item for discussion practically every quarter.

Q Had you, by the time of this announcement, you and Mr. Rifenburg, pretty much agreed, decided that as of the end of fiscal 1971, the sales of this type would be discontinued?

A We had gone a long ways toward making that decision. It hadn't been final and it wouldn't be made final until we decided not to make the sale.

Q In the same discussions regarding the change of the fiscal year and discontinuance of the sales of previously leased equipment, did you discuss with Mr. Rifenburg the possibility of changing the method of accounting for these sales?

A In what time frame are you discussing this?

Q During the discussions where the change in fiscal year and the discontinuance of sales of this type were discussed between you and Mr. Rifenburg -- did you also discuss the possibility of changing the method of accounting?

A I don't recall discussing this, anything about changing the method of accounting until fairly late in the month of April.

Q Was Mr. Rifenburg, during February and March of 1971, aware of your discussions with S. D. Leidesdorf regarding the method of accounting for these sales?

A It would have been my practice to report such discussions to Mr. Rifenburg and while I am not sure that I would have reported the luncheon discussions, I am sure the March 29th discussion with the partners of S. D. Leidesdorf was reported to Mr. Rifenburg in much detail.

Q Had Mr. Rifenburg been present at any discussion which you had with anyone from S. D. Leidesdorf where the appropriateness of this method of accounting had been discussed?

A You mean from 1969 on?

Q Let's say from the beginning of fiscal 1971 -- let's say from mid calendar 1970.

A From mid calendar 1970?

Q Yes.

A I don't recall that he was.

Q On or about April 15, 1971, did you and Mr. Rifenburg have a discussion regarding the possibility of following a different treatment for sales of leased equipment?

A I've tried to recollect this and it was sometime after April 15th that we had such a discussion.

Q Can you place the time of that discussion any more precisely than after April 15th?

A I would say it was closer to April 25th than April 15th so I would say it's around April 20th but, you know, I can place it no -- as I recall, I maintained no notes or anything that would help me refresh that recollection.

Q Can you place the time of that discussion with relationship to the conversation with Mr. Dobson of the Reuters Service?

A I would think it was after my conversation with Mr. Dobson.

Q Are you certain of that or uncertain?

A I am fairly certain.

Q Fairly certain?

A Yes. I would have to qualify it.

Q Whenever this discussion was, be it April 20th or thereabouts, will you tell us, please, what was said and by whom it was said in that discussion?

A Well, as best I can recollect, and I can only do

I in general terms, I indicated to -- I made a statement to Mr. Rifenburg that in view of the fact that we were discontinuing this type of transaction and in view of the fact that we had had this discussion with Leidesdorf and the accounting seemed to be trending away from the accounting that we had followed, that it might make some sense to consider a different method of accounting for these sales and that was the essence of the conversation.

Mr. Rifenburg said, "Listen, I really have no opinion on that, it seems strange, you know, that you can change your accounting," and I said, "Well, if we are going to change, obviously one of the things we have got to do is discuss it with our independent auditors." And he said --

THE COURT: Was anyone else present at this conversation?

THE WITNESS: I would think not although there could have been and the conversation may very well have been by telephone. Mr. Rifenburg and I were at different --

THE COURT: Did you finish your testimony as to the conversation or did I interrupt you?

THE WITNESS: I think I finished.

THE COURT: We'll break for lunch now.

(Luncheon Recess)

AFTERNOON SESSION

2:20 P.M.

THE COURT: You may continue the examination.

W A Y N E W E L L S, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. DEVINE:

Q Mr. Wells, before we recessed, you were telling us about the meeting of on or about April 20, 1971, between you and Mr. Rifenburg at which you discussed the possibility of changing the treatment for sales of previously leased equipment.

A I believe I said it wasn't necessarily a meeting. As I recall, it was in all probability a telephone conversation and I mentioned this to Mr. Rifenburg and he said, you know, that he hadn't thought about it and it was, he felt a technical accounting question and we ought to refer it to our independent auditors and get their view because if we were going to do anything like this, it would have to have their approval.

Q Can you recall what it is that you said to Mr. Rifenburg at that time?

A No, I don't recall other than to say that in view of the fact that we are discontinuing lease sales and in view of the fact that we had had this conversation with partners

of Leidesdorf, when they talked about the change in thinking of the accounting profession, that it's something that might be considered. I mean, we talk about a lot of things that we should consider and frankly I always hope to lay all kinds of options out and consider them one by one.

Q In the interim between the March 29th meeting with the Leidesdorf people and this conversation with Mr. Rifenburg on or about April 20th, had you discussed further with anyone from S. D. Leidesdorf the matters that had been discussed or any of the matters that had been discussed at the March 29th meeting?

A I just don't remember. I mean I had contact with the partners of Leidesdorf two or three times a week. They were gearing up for their examination at April 30th and I know I had conversations. I see no reason why I would have discussed this but I don't know that I didn't.

THE COURT: Did they examine you quarterly?

THE WITNESS: No. They examined us once a year but because we are now changing our fiscal year they had to make preparations to take inventories at the end of April and do preplanning for the audit.

Q Do you recall whether Leidesdorf had people on your premises at this time, let's say in mid April, in connection with the upcoming audit?

A I don't recall but it would certainly be logical that they would have had.

Q In connection with your conversation with Mr. Rifenburg on or about the 20th of April, had you made any calculation or any estimate of the impact which a change in the way of accounting for these sales might have on Mohawk's financial statements?

A No, I had not. If I recall, it's a thought I had, frankly, probably while shaving that morning and when it was convenient to talk to Mr. Rifenburg I broached the subject with him and it was spontaneous.

Q Did Mr. Rifenburg ask you what would the impact of this be?

A Not that I recall. I mean it was obvious the direction of the impact, the quantification of the impact. He didn't ask and we didn't pursue it.

Q What would the direction of the impact be?

A Well, the direction of the impact would be if we went from the method of recording these transactions of sales to the operating method, it would have an impact on the income and the impact would be downward.

Q Did Mr. Rifenburg ask you for what accounting periods there would be any impact?

A I doubt it. He might have. I don't recall.

Q You are not sure if he asked you if it would apply to fiscal 1970?

A I would be very surprised if he did. I would be almost positive he did not because when I went to Leidesdorf we r[illegible]r talked about 1970.

Q Is that that you did not ask Leidesdorf about 1970 or that it didn't come up, either way?

A It did not come up either way.

Q As I understand your testimony, Mr. Rifenburg suggested that there be a communication with Leidesdorf on the subject?

A I don't know whether I suggested it or he suggested it but we agreed that there should be.

Q Did that communication with Leidesdorf subsequently occur?

A Yes.

Q Did you make that communication?

A Yes.

Q When was that?

A Shortly after my conversation with Mr. Rifenburg. I would say if not that day, within a day or two.

Q Who was it that you spoke to?

A Mr. Wise, a partner of Leidesdorf.

Q Can you recall in substance what it was that you

said to Mr. Wise at that time?

A No. I think the substance of it was that as he knew, we had indicated to them on their March 29th meeting, that we were considering discontinuing the sales. It was several weeks later. We had made the decision that we were undoubtedly going to do it, we were at least going to recommend that we stop these sales and if we did, what would their attitude be if we went to the operating method as compared to the method previously followed and at that time I think we only -- in fact I know we only talked about the year 1971.

Q Did Mr. Wise respond immediately to your inquiry?

A He responded that he thought that, he saw no reason why it wouldn't make sense to do it but he said, this is a very complex, technical matter and he would like to discuss it with his senior partners and by that I knew he meant Mr. McClare, among others.

Q Were you a partner to any discussion subsequent to that one which involved Mr. McClare?

A No, not that I recall. No, I know I wasn't.

Q Did there come a time when Mr. Wise came back to you with some further response on this subject?

A Yes. Within a day or two Mr. Wise came back to me, confirming that they would have no objection to us handling

it, these things on the operating method.

Going on to say that with the state of the developments in accounting we can account for it either way. They had already told us we can account for it as sales. Now they told us we can also account for it on the operating method.

MR. DEVINE: Your Honor, the gentleman who just came in is Harvey Wertheim. He is a director of one of the plaintiffs and for that reason I think it's appropriate for him to be here, rather than to be an excluded witness but before I can --

THE COURT: There has been no application to exclude him as yet. If there is, I'll deal with it when it comes.

MR. DEVINE: He just arrived and I don't want to surprise anyone.

MR. UNGER: I was aware, Mr. Devine told me he was coming. I assumed he was. No objection to his staying.

Q I am sorry to interrupt that testimony.

A Yes, sir.

Q When Mr. Wise came back to you and indicated that the change in accounting could be made, did he indicate that it should be made?

A Well, I think if anything he indicated the preference would be to go to the operating method. He thought the account-

ing profession was moving that way and this would make sense, he thought it was a more conservative method and the firm of Leidesdorf and ourselves have also kind of prided ourselves in following conservative accounting.

Q Did he state whether or not he had spoken with Mr. McClare on this subject prior to calling you back?

A Well, he checked with the other senior technical partners and I just -- I don't know whether he told me he talked to McClare or not but obviously I knew that McClare would be one that he would go to.

Q Did he indicate to you whether Mr. McClare had said anything further about the change in the propriety of the nonoperating method, let's call it? Did he say whether there had been any update on the information which Mr. McClare had given you at the March 29th meeting?

A Not that I recall.

Q When Mr. Wise called you back, did he make any comment as to the effective date when the change in accounting should be commenced?

A I don't recall but I think in the framing of the question and everything it was assumed that it would apply for the entire year of 1971 because I can't imagine that -- I couldn't imagine and I can't even foresee that I would even ask the question. We would follow both methods the same fiscal

year.

Q When you say 1971, you are speaking of fiscal 1971?

A Yes, that's right.

Q At that time, Leidesdorf knew that would be a nine-month period ending April 30, 1971, is that correct?

A That's correct.

Q Did Mr. Wise have anything to say regarding whether or not fiscal 1970 statements should be restated in accordance with the changed method?

A I don't recall that that was a matter for discussion at that time.

Q Did you ask him about that at that time?

A I don't recall. I don't think I did.

Q If fiscal 1971 was reported on using the operating method, would it have been consistent accounting to have failed to restate fiscal 1970?

A In my opinion and as it later developed in discussion with Leidesdorf, we felt it was consistent to restate 1970, put it on a comparable basis.

Q I think I asked the question the other way around, would it have been consistent to not restate 1970?

A I might -- it wouldn't have been consistent. Whether it would have been proper or not, I don't know.

Q Isn't part of the normal auditors' certificate to

say that the statements for this year are prepared on a basis which is consistent with the preparation of prior statements?

A Yes. And I am not sure they didn't and I would have to look at their certificate. I am sure they didn't take this as an exception even though it were restated, maybe they didn't.

Q In either of the two conversations with Mr. Wise which you have been testifying about, namely, the one where you called him following your conversation with Mr. Rifenburg and the one where he called you back one or two days later, did you point out to Mr. Wise the rate of lease terminations that was occurring at that time and in prior months of fiscal 1971?

A I think I did. I think that that would be part of the reasoning going to this, to the change.

Q Do you recall whether at the time you pointed that out to Mr. Wise he was already aware of it?

Did he indicate to you that he was already aware of it?

A I don't recall but there had been so much printed and they had access to all of our records, my gosh, it shouldn't have been any surprise.

Q Did Mr. Wise on either occasion comment on the rate of lease terminations vis-a-vis the proposed change in

accounting?

A Not that I recall.

Q After speaking with Mr. Wise the first time, when you called him, did you report back to Mr. Rifenburg with respect to that first conversation?

A I am sure I did and we talked, when he was in we talked almost daily and I am sure I gave him a rundown of almost everything I did and I am sure I reported that back to him.

Q Do you recall what he said, if anything, in response to that report?

A I would guess that he said, well, that's interesting or something like that. It would not be a subject that he would have a lot of comment on.

Q Do you recall with any more specificity what his comment was on the report which you gave on the second conversation with Mr. Wise?

A No. I think he said, you know, that now that we have their thinking, we have got to do some more thinking about it.

Q Do you recall when it was that you reported to Mr. Rifenburg on the second conversation with Mr. Wise?

A I don't but I would say if the first conversation took place on the 20th, probably the second conversation took

place roughly a week after that.

Q Following your report to Mr. Rifenburg on the second conversation with Mr. Wise, between that time and the end of April, 1971, did you have any further discussions with Mr. Wise or anyone else from Leidesdorf with respect to this proposed change in accounting method?

A I don't recall any and I would doubt it.

Q Did you discuss this any further with Mr. Rifenburg let's say prior to April 28, 1971?

A No, I would doubt it.

Q On May 4, 1971, did Mohawk conduct a meeting for security analysts?

A Yes.

THE COURT: When was the date of the meeting?

MR. DEVINE: May 4th.

THE COURT: When was the date of the meeting at which the merger was voted?

MR. DEVINE: April 30th.

THE COURT: What difference does it make what he did on May 4th?

Q Did such a meeting occur?

A Yes.

Q Where did it occur?

A King of Prussia, Pennsylvania, at our plant there.

Q Who was invited to that meeting?

A Security analysts that followed the computer industry.

Q What was the function of that meeting as you understood it prior to the meeting?

A It was an update that we tried to have with security analysts on a regular basis and this, I think we had the last one in the fall of 1970 and this was merely an update. The meeting was scheduled probably sixty days before that.

Q Who attended the meeting on behalf of Mohawk?

A Mr. Rifenburg, myself, Mr. David Hemphill who was a vice president in charge of the King of Prussia plant and there may have been other people from the King of Prussia plant who reported to Mr. Hemphill, that's all that I recall.

Q You indicated that this meeting had been scheduled some, I think you said, sixty days prior.

Had it been adjourned at an even earlier date?

A No. I mean, let me just describe. We try to have meetings with the security analysts two or three times a year and generally the way it happens, we have a meeting and things are quiet for a couple or three months and momentum begins to build up and the security analysts want to get together and, as I recall, toward the end of January, the beginning of February, we were getting lots of calls from security

analysts, when are we going to have the next meeting.

So we picked a date that was convenient to Rifenburg and myself and to the security analysts and scheduled it and May 4th happened to be a good date.

Q Was that date picked with reference to the Atron merger?

A Not at all.

Q When were invitations to the May 4th meeting sent?

A At least a month before.

Q Who on Mohawk's behalf was in charge of setting up that meeting?

A Mr. Ron Hengen. He is a partner of Bejan & Hengen and he was our outside counsel in connection with public affairs.

He was our contact in the Wall Street area, knew all the security analysts and they came to him with questions. He was always accessible to answer their questions and if he thought it was desirable he pushed them on to one of the members of the MDS management.

THE COURT: If you are going to ask me to take evidence of something that happened after the date of the meeting, I would like you to go right to the heart of it. Let's forget the details. They held a meeting, it was attended. Let's find out what happened. Let's go to the

heart of it.

MR. DEVINE: I am really interested to a great extent in the event that led to that meeting, in addition to the meeting itself.

THE COURT: What's at issue here as I understand it is the knowledge of the corporation, Mohawk, through its officers and directors, up to and including the date on which they voted to approve the merger.

Now, if it's coming in as circumstantial evidence that because they did something on May 4th they must have known about it on April 30th, I'll take that but let's get right to the heart of it. We are wasting a long time with this witness. Let's move along.

MR. DEVINE: Well, I am trying to move as quickly as I can. I do think it's important.

THE COURT: Well, move along. All right.

Q Who on Mohawk's behalf supervised the preparation of the agenda for the meeting?

A Well, Ron Hengen and myself. I would be the one that would work and then we would work closely with Mr. Rifenburg, who obviously had more interest in the technical side, the mechanical side of our products and things like that.

Q Who decided what substantive matters would be discussed at the meeting on Mohawk's behalf?

A I suppose the three of us.

THE COURT: Was there a printed agenda for this meeting?

THE WITNESS: There was not. There was a press release that was read at the meeting but there was not a printed agenda.

Q How long before the date of the meeting did you begin to consider what items would be discussed at the meeting?

A 28th, 29th of April, thereabouts.

Q When did you begin discussions with Mr. Hengen with respect to the substantive matters to be discussed at the May 4th meeting?

A Those dates. The kickoff for that would be my discussion with Mr. Hengen.

Q Would that also be the kickoff for your discussions with Mr. Rifenburg as to what would be discussed at the May 4th meeting?

A Well, Mr. Rifenburg always asked us, Hengen and myself, to prepare a press release and items that should be discussed at the meeting and he wasn't particularly interested in it until we had our facts together and had drafted something and everything.

Mr. Rifenburg is pretty fast on his feet and he did

very little preparation for meetings like this.

Q I show you Plaintiff's Exhibit 22 for identification which is in evidence and I ask if that is a true copy of a press release which was given by Mohawk in connection with the security analysts' meeting on May 4th?

THE COURT: Well, that's conceded, isn't it?

MR. DEVINE: I think so.

THE COURT: Let's not waste a lot of time with this.

Q Who, to the best of your recollection, prepared the first draft of that press release?

A Mr. Hengen.

Q Do you know when he prepared it?

A As I said, sometime around April 28th or 29th. It wasn't -- we didn't do this very far ahead of the meeting.

Q Did the first draft of that press release include the last paragraph on the second page?

A There was something in the draft that covered the last paragraph. Now, it could be in very different words. Mr. Hengen --

THE COURT: Could I see it, please?

THE WITNESS: Yes.

THE COURT: You may continue.

A The policy was that Mr. Hengen did the drafting and I would call him and tell him generally what we wanted in

the press release and he would prepare a first draft.

Now, oftentimes it was a very brief discussion with Mr. Hengen and he would, like anything else, would sometimes get it garbled and not have in the thought that I would want to put in there and, so, after he had prepared a draft or two or often three or four, then we would get together and start polishing it to get a final draft of a press release.

Q Can you recall specifically redrafting that paragraph after Mr. Hengen's first draft?

A No, I do not. I mean I don't say I didn't but I can't recall redrafting it.

Q Well, is it fair to conclude, then, that you are not sure whether the wording of that is the wording of Mr. Hengen solely or whether it's his wording as redrafted with your efforts? Are you uncertain as to which it is?

A Yes. I've got to be uncertain. I just wouldn't know. I would be very surprised if we didn't sit down and polish it up when we sat side by side.

Q Do you recall when it was that you sat side by side?

A I would say April 30th.

Q Where did that occur? Where did that April 30th meeting occur?

A Undoubtedly at our offices at 20 East 46th Street in Manhattan.

Q Was Mr. Rifenburg present at that meeting?

A No, he was not.

Q Do you know where Mr. Rifenburg was on April 30, 1971?

A He was not in New York City. I think he was in Herkimer, New York, but he was accessible by telephone, that's all I know.

Q Do you recall at that meeting calling Mr. Rifenburg?

A Yes.

Q I am talking about the meeting with Mr. Hengen on th 30th.

A Yes. At the time that we -- I say that -- after we completed our draft, we called Mr. Rifenburg. Now, I am, I can't recollect and I haven't asked Mr. Rifenburg whether it was that Friday or whether it was over the weekend but certainly before Monday morning I had called Mr. Rifenburg and had read him this press release in the final draft as we had it.

Q Are you certain that Mr. Rifenburg was not in New York on April 30th?

A I am almost --

Q New York City.

A I am almost positive.

Q When you called Mr. Rifenburg, be it on the 30th or

over the weekend, did you read him the press release and its form at that time?

A Word by word.

Q Did Mr. Rifenburg make any comment on its contents?

A I am not sure. I mean he could very well have suggested some changes in wording. I would guess offhand if he did suggest any change in wording it was primarily as we discussed the products of MDS. It probably was not this paragraph here.

Q You don't recall him making any comment on the last paragraph on the second page, is that correct?

A Not as far as the wording of it. I think he, his position was, as I recall, that -- I pointed out to him that we are putting in this paragraph, there are certain things in this paragraph that are almost stating the obvious, such as the establishments of reserves for idle 11CO's, receivables, inventories, because that was going to be the subject of the audit, and the auditors were going to insist upon proper reserves for these items and I knew that -- and we were on record that it had been a tough year in the data processing industry and very well could have -- we had to look at these things very carefully but that was a statement of fact. That had to be done anyway and then, I told Mr. Rifenburg I thought we ought to put in this quote, "And the account-

ing treatment for past sales to third party lessors, a program that is being discontinued," and I pointed out in the first line in which they were being reviewed.

Mr. Rifenburg took the position that since we are having the security analysts meeting, this would be a good time to use this as a trial balloon because we had everything to gain and nothing to lose because our accountants had told us we can go either way, so let's see what the security analysts thought about it.

Q Did you expect at that time that the security analysts would be interested in this last paragraph on the second page?

A I think there is interest in the whole press release. We wouldn't have written it if we didn't think it would be.

THE COURT: That last sentence in there is not true, is it, to the extent that the sentence implies that any or all such accounting adjustments would have no effect on earnings for the revised fiscal year just ended, that isn't strictly true, is it?

THE WITNESS: I'm sorry.

THE COURT: The last sentence --

THE WITNESS: Mine says it's premature at this time to indicate the effect and let me say, maybe, you know, I, what that was intended to mean and maybe we didn't use the

best draftsmanship we could, the particular effect.

THE COURT: But you had no doubt that all of those items listed in that paragraph would have a depressing effect on earnings.

THE WITNESS: No, no doubt at all and certainly any conveyance to the security analysts was in that tone. The thing, trying to point out there that we couldn't quantify this at this time.

THE COURT: All right.

Q Subsequent to your reading this draft of the press release to Mr. Rifenburg, was its contents changed before it was released to the public?

A As I say, I don't recall. I mean it would not be unusual for Mr. Rifenburg to have comments upon any and all of this. I doubt that he had any comment or we made any significant change in that paragraph or the next paragraph. The others I am -- he was not bashful about indicating where he felt something ought to be changed. I don't think he changed the essence of it. It would only be in the manner, the way we put it.

Q When was this press release distributed? Do you know that? To the public.

A Sometime after our May 4th meeting. We would not have it available at the May 4th meeting for distribution. It

would have been Ron Hengen's function to do it after the meeting, if he ever did distribute it.

Q When was it that you left New York for the King of Prussia meeting?

A The evening of May 3rd.

Q As I recall, May 3rd was a Monday. Is that consistent with your recollection?

A That's right. We always tried to have our analysts' meeting on Tuesday or Wednesday.

Q Did you travel to King of Prussia with Mr. Hengen?

A No.

Q With Mr. Rifenburg?

A No.

Q Was Mr. Hergen in King of Prussia for that meeting on May 4th?

A He was there May 4th. He went down, I think, roughly the same time I did, although we didn't travel together.

Q Do you recall when you last met with Mr. Hengen before leaving for King of Prussia?

A I know I had a luncheon date with Mr. Hengen on May 3rd.

Q Did you meet with Mr. Rifenburg at any time between April 28th and May 4th? I mean meet with him face to face.

A We had a meeting the evening of May 3rd. I think

if we didn't have dinner together we had conversations together and the fact is, as I recall, we had an early breakfast meeting May 3rd on an unrelated matter that I don't believe was even covered in the press release but was the subject of an additional press release that was announced at that same meeting.

Q This was a breakfast meeting with Mr. Rifenburg?

A Yes.

Q On May 3rd?

A May 4th.

Q Prior to leaving New York City for King of Prussia, were you interviewed by the Wall Street Journal?

A Yes. When, as we were drafting this press release, it was Ron Hengen's position that it was a --

THE COURT: Well, your answer is yes. You were interviewed by the Wall Street Journal. Let's move along.

Q When were you interviewed?

A At lunch on May 3rd.

Q Who else was present?

A Mr. Hengen and Mr. Schmedel of the Wall Street Journal.

Q How had that meeting been arranged?

THE COURT: Really, I don't care. I must get down to the essential elements of fact here. He had a meeting with

the Wall Street Journal, nothing unusual about that and if you want to prove what he said there or what they said to him, I'll take it but we are getting much too detailed and this case must proceed at a better rate of acceleration here.

Q When had the luncheon meeting been arranged?

A Either late Friday afternoon or early Monday morning.

Q Friday was April 30th, is that correct?

A That's right.

Q In estimating for Mr. Schmedel at that luncheon the impact of the accounting change, namely that it would be about ten to twelve cents per share, what kind of calculations did you make to come up with that estimate?

A First I've got to say that I did not want to make any --

THE COURT: No. You give the man a responsive answer. He asked you a question and you answer it.

A Could I have the question again?

(Record read)

A Well, I can tell you roughly the calculation. I made it on a napkin. We had been selling a million dollars a quarter. As I recall, we made about 40 percent gross profit which would be about $400,000, 50 percent tax rate is

$200,000, and we had about five million shares outstanding so that was about four cents of income per quarter and I multiplied that times three. I knew there would be some rents effect in some of this so I came up with a ten or twelve cents.

Q As it turned out, in what ways was that calculation inaccurate?

A Well, as I recall, the calculation was a pretty good calculation. It's surprising that it ended up that way. As I recall, I don't have it in front of me but I have seen it recently, when we issued a press release at the -- in July, announcing the earnings for the nine months, I believe we said that the impact upon earnings was something like a million three seventy-five and that was pretax and if you take the tax effect off, you are right in the $600,000 -- which is roughly twelve cents a share.

Q At any time prior to your meeting with Mr. Schmedel, had you made any calculation of the impact that this proposed change would have, anything more detailed than what you did on the napkin at that luncheon?

A No, I had not.

Q Do you know whether anyone at Mohawk had addressed themselves to the impact of that potential change?

A No. Absolutely not. This was just a thought that we had and it was not -- we had done no detailed work.

Q Did Mr. Schmedel ask you whether the change in accounting method would have any effect on the fiscal 1970 statements?

A As I recall, he did.

Q What was your response?

A My response was that if we decided to go ahead, that we would probably restate the previous year.

THE COURT: This was on the 3rd of May?

THE WITNESS: Yes.

Q I show you Plaintiff's Exhibit 23 which has been marked for identification and I would ask when you first saw the last article which is copied on that page.

A The morning of May 5th.

Q Had you seen a draft of that article before it was published?

A No, unfortunately I didn't.

Q At any time did you request that the Wall Street Journal in any way correct or retract that article in whole or in part?

THE COURT: What possible difference would that make?

MR. DEVINE: Well, I think, your Honor --

THE COURT: We are getting far afield here. Your client's rights are vested by the facts and circumstances on

April 30th when they cast their vote at this special meeting, isn't that so?

MR. DEVINE: Yes, your Honor, but I think --

THE COURT: This witness has admitted he told the Wall Street Journal, and I take it he is prepared to admit that this article is a fair report of the facts therein stated, is that right?

THE WITNESS: The article does not go -- goes further than our press release and states things that were fact that we were considering and it isn't handled the way, and it isn't put in the same way that our press release is.

Now, I did not make any attempt to call Scott Schmedel.

THE COURT: You made no attempt to correct or deny anything contained in the article?

THE WITNESS: That's right.

Q To your knowledge, did anyone on behalf of Mohawk make such an attempt, to have a correction or retraction printed?

A Not that I know of. Ron Hengen might have but I doubt it.

Q At the time of the May 4, 1971, security analysts' meeting, did you expect that the analysts present at that meeting would take the information they obtained and prepare

certain reports?

A Yes. That was our normal procedure after such a meeting.

Q At that time, what did you understand to be the function which those reports would play?

A They would distribute them to their clients and within their organizations.

Q Did you understand their clients to be investors?

A Yes.

Q Is it fair to say that the information in the last paragraph of the second page of the press release was widely distributed by Mohawk to shareholders and the investing public by virtue of the press release, the newspaper article and the analysts' meeting?

THE COURT: I'll take an offer of proof of relevancy on that. I think we are getting very far afield and we've spent something like a half an hour on this May 5th meeting.

As I understand your pleadings here, your client's rights vested on April 30th, that's when there was a breach of the duty that you claim was owed to them, isn't that so?

Suppose he answered it yes, what would that lead to?

MR. DEVINE: Well, I would like to show by this

witness and I think it's --

THE COURT: Can you give me an offer of why it's relevant?

MR. DEVINE: I think it's relevant to the question of materiality because I believe that this witness can testify that the information contained in that press release and as it was also reported at this meeting and as it was reported in the Wall Street Journal, that this thorough coverage of that information was arranged by Mohawk for the purpose of seeing that the investing public learned it and with knowledge that the investing public would be interested. I think, therefore, it's relevant to the question --

THE COURT: There is no doubt about that, is there?

THE WITNESS: I don't think so.

MR. DEVINE: Your Honor, I have a series of questions which go to the ultimate impact of the restatement of earnings.

THE COURT: Can't that be conceded? Don't we know that somewhere?

MR. DEVINE: I was going to suggest for the purpose of moving on with it, maybe we could work directly from documents and testimony in the post trial material to make those computations rather than to draw it out of this witness.

THE COURT: Well, I don't know what material you have

before me for that matter but if that can be stipulated to, I would like to take a stipulation.

I think it's important what the fiscal year of 4/30/71 would have shown had there been no change in the accounting methods.

MR. DEVINE: All right. I think I can short-cut that.

MR. UNGER: I believe that the restated year would be in what has been introduced as Plaintiff's Exhibit 33.

THE WITNESS: But that's for 1970, not --

MR. UNGER: The restated year would cover 1970 but I would take objection to the relevancy of any effect of the restatement for a year going back a year before anything, any of these events, which is the '71 year.

MR. DEVINE: I think I can short-cut it.

THE COURT: I would like you to get the facts in. We can argue the relevancy later. I would think that '70 might be relevant because I take it that in your proxy statement you have comparative financials for '69, '70 and '71 earnings, do you not, six months?

MR. UNGER: Yes, there are some in there that cover the '70 year.

THE COURT: So it could certainly be argued that the effect upon the reader might be different if these had

all be restated in accordance with the changed principles which were adopted for the short fiscal year ending April 30, 1971.

What would the earnings have been for the short fiscal year ending 4/30/71, if there had not been the change in accounting principles?

THE WITNESS: For this item that is under discussion?

THE COURT: Yes. That's the only change of accounting principles that took place, isn't it?

THE WITNESS: That's right.

MR. DEVINE: I might note, as the witness answers this, that I have put in front of him Plaintiff's Exhibit 25 for identification.

THE COURT: Can you answer that?

THE WITNESS: Yes. I am going to answer it roughly because the pretax effect wa a million three fifteen and, using a 50 percent tax rate, would come down in the area of $650,000.

And, as I recall, we had something like five and a half million shares outstanding at that time so I put that in the area of about twelve cents, was the effect of this.

THE COURT: Do you agree with that? Let's see if counsel agree with that.

MR. DEVINE: Your Honor, I certainly agree with the figures that he has recited. As to the tax effect and the reductions which he attributes to tax effect, I think it's something that can be briefed and need not be argued at this time.

THE COURT: It can't be briefed unless you have the facts. If 50 percent is not the applicable tax, that will have to be conceded or stipulated to or testified to.

MR. DEVINE: Can I say, your Honor, I don't believe that there is any substantial dispute about that. However, not being an accountant, I would, as to the actual tax effect of what he has described, I would like to reserve.

THE COURT: Do you agree with the twelve cent figure?

MR. UNGER: I agree with the witness' testimony.

THE COURT: Do you accept it as being valid, that if the accounting change had not taken place, the operating results for the short fiscal year would have stated twelve cents greater earnings?

THE WITNESS: Or as it happened, MDS reported a loss of eighteen cents and a loss would have been six cents instead of eighteen cents.

THE COURT: I see.

Is that agreed to and accepted for purposes of this case or not?

I don't ask you to do it if you don't think you should.

MR. DEVINE: Your Honor, the figure recited I have no reason to dispute. I am only concerned, because of my own lack of expertise in the accounting area, as to the tax impact. I think it is correct, approximately. Before I stipulate I would like to have a chance to review it.

THE WITNESS: I'm going to be very surprised. I was also in charge of the tax people and I would be very surprised if it wasn't right at 50 percent.

THE COURT: Did you pay a 50 percent tax in that year?

THE WITNESS: Paying the tax was another thing because we had accelerated depreciation, and other things, where we would pay a different or less tax than we accrued, but we also accrued the taxes and put them in the income account.

THE COURT: Straight line depreciation?

THE WITNESS: Yes.

THE COURT: So, from the analysts' point of view, they would have stated -- what was the figure, eighteen cents?

THE WITNESS: Eighteen cents was the loss we reported. I think we would have reported something in the neighborhood of a six cent loss if we had continued our previou

method.

MR. DEVINE: This was a loss year situation and I think --

THE COURT: The man said that in fact they had no tax liability, because they were taking accelerated depreciation on the rental equipment. What they did for profit and loss purposes, they booked on the basis of straight line depreciation, is that right?

THE WITNESS: Yes.

THE COURT: And, therefore, well, you still would have had no income tax that year for your straight line, for your pro forma?

THE WITNESS: No. And actually we showed a credit against this. We showed a credit against this and carried it back to a year when we paid a tax and got a tax refund.

Q Exhibit 25, Plaintiff's Exhibit 25 is in front of you, Mr. Wells.

Is that a true copy of a press release which was issued by Mohawk on or about July 7, 1971?

A As far as I can see, yes.

MR. DEVINE: I offer it in evidence.

MR. UNGER: I am going to object to the relevancy of it. It's a press release dated July 7th of 1971 and I also think it's cumulative with Plaintiff's 33 which has the

same figures in it in terms of -- probably in much greater detail.

MR. DEVINE: In fact, it has more detail, this document has more detail than Plaintiff's 33 and, in fact, they differ.

THE COURT: If this witness states that the material stated in here is true and correct and affects the financial condition of the company as at April 30th of '71, I would take it.

Objection overruled.

Is that so? Are these figures in here true and correct?

THE WITNESS: As far as I know.

THE COURT: All right.

xxx (Plaintiff's Exhibit 25 received in evidence.)

THE WITNESS: They are based on our audited figures for the year and if they are not --

THE COURT: All right.

Q Mr. Wells, will you look at the last page of exhibit 25? You will see that in the release Mohawk is reporting certain adjustments to income in addition to that attributable to the change of accounting method on sales of leased equipment.

Would you describe as briefly as possible what those

additional adjustments to income were?

A Well, the first item is, reflects the pooling of interests involving the Atron Corporation and that is really taking Atron's loss for this period of $540,000 into the combined company.

The second item is that we made additional provisions to reserve for accounts receivable in inventory of two million eight sixty-five.

THE COURT: Both receivables and inventory?

THE WITNESS: That's right.

THE COURT: What inventory did you have? Did you count your machinery out on rental as inventory?

THE WITNESS: No. That was leased equipment. This is parts, our manufacturing operations and things like that.

THE COURT: All right.

Q What kind of receivables was there a reserve being set up for?

A Receivables we had from all, any and all of our customers.

Q What's the amount of the reserves indicated by this release?

A Two million eight sixty-five was the amount of the inventories and receivable reserves.

THE COURT: I think he is asking you can you break

it down between receivables and inventories and I cannot do it here.

Q The adjustment which is recited on the third page of Plaintiff's Exhibit 25, is that the same reserve for receivables and inventory which is referred to in the May 4th press release?

A The May 4th press release, we indicated that we would consider making, establishing reserves for receivables and inventories and to that extent it's the same categories.

Q When was it in fiscal 1971 that you first considered the appropriateness of setting up reserves of this kind?

MR. UNGER: Objection, your Honor. As I understand from reading the complaint there is no claim made with respect to pooling of interest of Atron and receivables, the inventories or any of these other items.

THE COURT: There are financials attached to the exhibit 18 and there are statements about the general condition of the business of Mohawk and I suppose that if when that proxy statement was effective this witness knew that he was going to make certain adjustments in a substantial amount that that could be elicited.

As far as the pooling of interest is concerned, of course that is an obvious ting. That followed from the

merger, so don't ask about that but I'll permit him to answer.

Perhaps you might reframe the question.

Q I would like you to try and recall to mind when it was that you first considered the necessity for appropriateness of setting up reserves for certain accounts receivable and inventories for fiscal 1971.

A It was sometime after June 15th, because our auditors took physical inventories as of April 30th and when I say as of, I mean that is the date they used, and it took them well over a month or longer to compile these inventories, to price them, to review for obsolescence and things like that and in this case, since they got a late start and because of the condition of the data processing industry, a much tougher look was taken at obsolete parts which it should be at all times but it was particularly true this time, looking at the aging of accounts receivable as of April 30th which they probably didn't even get until the first -- until the first of June, and all of these things, and this was brought to my attention sometime around June 15th, probably later rather than earlier.

Q Well, this is referred to in the May 4th press release, isn't it?

A No. The May 4th press release states the obvious.

I mean, if we needed to set up reserves for receivables, inventories and idle equipment, we would set them up. I mean we were going to have an audit. We were going to have an audit as of April 30th and our auditors are going to insist that we set them up, if we needed them.

I had no knowledge that they might need to be set up. I thought it was appropriate when we were talking about the condition in the data processing business at least to allude to it at this meeting and let me tell you at this time I didn't think we would have to set up any reserves.

Q When the reserve turned out to be 2,800,000 in magnitude, are you telling us that that came as a surprise to you?

A It certainly did. It was a shock to me and I was sick.

Q Did you have any system during fiscal 1971 for getting periodic reports on this information?

A Yes, we did but these had infirmities. No inventory system is perfect and when you are going into a time like this in the data processing industry or any industry, when things are turning down, there is a lot more obsolescence that comes faster than your book records indicate.

Q Well, during fiscal 1971 when you were receiving periodic reports on questionable receivables and inventories

was there no indication that the magnitude of reserves that would be required would be this great?

A That's right.

Q There was no indication?

A No, sirree. It came as a shock to me.

Q The item which is headed "Provisions for Off-Rent Equipment," again referring to Plaintiff's Exhibit 25, does that relate to equipment which had been leased and returned to Mohawk?

A That's right. It related primarily to our old seven channel equipment which is some of the first equipment that Mohawk marketed, the so-called 1100 model, and we suspected that we were going to need reserves for this. We talked about it there. Frankly, that one didn't disturb me too much.

Q Did the 600,000 figure which is opposite that entry on Plaintiff's Exhibit 25 tie in at all to the 25 percent lease termination rate which you testified about this morning?

A That is consistent with that, yes.

Q And that termination rate was reported on to you regularly during fiscal 1971?

A That's right.

Q The provision which is made for off-rent equipment, $600,000, did you have any discussion prior to April 30, 1971,

with Mr. Rifenburg regarding the need for a provision against off-rent equipment?

A I think I did and I think his position was he didn't think we were going to need any reserve. This was a surprise to him.

Q Did you discuss prior to April 30, 1971, the need for a provision against off-rent equipment with anyone from Leidesdorf?

A No.

Q Very briefly, what are the events which caused the $450,000 reduction after the heading "Other" on Plaintiff's Exhibit 25?

A It was two items and I've forgotten what one was but one was an investment we made in a company out in Detroit that we thought it was questionable whether or not we would recover on that investment. We set up a reserve for it. And as I recall, later we collected 80, 85 cents on the dollar. I've forgotten the other one. I just don't know.

THE COURT: Were they operating or nonoperating items?

A Operating items. They were extraneous items but they were of an operating nature and we handled them as an operating item, not a special item.

Q Do you recall at what meeting the Mohawk executive

committee approved the change of Mohawk's fiscal year? I may have asked this this morning but --

A No, I don't remember.

Q Do you recall if the Mohawk executive committee met in March of 1971?

A I don't recall. I mean I am not saying that they didn't. I just don't remember.

Q Do you recall if it met in June of 1971?

A No, I don't.

Q Were minutes always kept of the Mohawk executive committee meetings?

A Yes, sir.

Q Mr. Wells, would you look at the third paragraph of note J on page 46 of the proxy statement. This is Plaintiff's Exhibit 18.

Did you have an opportunity to comment on this note before the proxy statement was finalized?

A Yes, I did.

Q That paragraph to which I directed your attention includes the statement, "The maximum liability for future rental payments during such five years under such agreements at July 31, 1970, discounted to present value approximates $4,200,000."

Do you see what I read?

A Yes.

Q Whose liability is referred to there? Who has the liability of $4,200,000?

A In my opinion it's the lessee's under the -- that are renting this equipment from the third party lessor.

Q Was it also true that Mohawk had a liability in the same amount at that time?

A We were the conduit to pass on these rental payments and we would pass them on to the third party.

THE COURT: We had all this this morning, didn't we? Wasn't it conceded that if they didn't pay, Mohawk had to pay.

MR. DEVINE: Yes. I think I am pointing out that in the note J to the proxy statement, the maximum liability of $4,200,000, I think, is very material and it certainly is not understandable as drafted whose liability is being referred to. If it's Mohawk's, it's important, if it's not Mohawk's, it's quite another thing and I just wanted to elicit from this witness that the confusion was not only in the minds of the reader but it was in the minds of the draftsmen as well.

THE COURT: Well, it's not clear to me he drafted it.

Q Did you draft this?

A If I indicated there was any confusion in my mind it was intended to be, to mean liability of the lessees. I didn't have any confusion.

Q Well, is there any statement in the proxy statement in any place, this note or any other place, that Mohawk had an equivalent liability?

A No, because I don't think we thought we did.

Q Do you still think, as of today, that you didn't have that liability?

A Yes.

Q On January 29 of 1971, was there a meeting between officers of Mohawk and Atron?

A Yes, I believe there was.

Q Was that the first occasion on which you discussed with Atron officers a potential merger between the two?

A I would characterize it as the first time we had serious discussions. We have had discussions in rather casual manner over the years practically every time the top officers of MDS and Atron met -- you know, that why don't we get together, one of these days we ought to get together or something like that.

Q You would say that it's fair to state that this was the first serious discussion?

A That's right.

Q How was that meeting arranged?

THE COURT: Does it matter? They had a meeting. Your people were not at it, were they? Your people didn't attend.

MR. DEVINE: Your clients.

THE COURT: No. They are not bound by anything that took place there and I don't care how it was arranged. Anything that happened at that meeting is merged in exhibit 18, isn't it?

MR. DEVINE: I think not, your Honor.

THE COURT: I'll excuse the witness and I'll let you give me an offer of proof as to what is material that could possibly have happened at this meeting.

Suppose he had told Atron all of the things that you claim should have been revealed. That wouldn't be notice to your clients, would it?

MR. DEVINE: No, it would not but it certainly would be, that and some other things would certainly further our case on the questions of materiality and on the questions of knowledge of the parties prior to April 30th, which is relevant.

THE COURT: Well, if he made a statement at the meeting which shows his knowledge I'll allow it but who arranged the meeting certainly means nothing to me.

All right. They had a consensual meeting. Nobody was forced to attend and somebody said something, let's find out what it was.

Q Prior to the meeting, was there any prearrangement that a merger would be discussed?

A Not that I knew.

Q Had the Atron people been invited to that meeting for the purpose of talking about a merger?

A They may have been. Rifenburg arranged the meeting and they could very well have been told come on in and let's talk about a merger.

THE COURT: Were you at the meeting?

THE WITNESS: Yes.

THE COURT: I'll let you ask him what he saw, what he said and what was said to him, not to speculate on what Mr. Rifenburg may have thought.

MR. DEVINE: May I ask one preliminary question?

Q Prior to the meeting of January 29th, had you or to your knowledge anyone at Mohawk made any study of the appropriateness or attractiveness of a merger with Atron at that time?

A No.

Q Is it fair to say that at the January 29th meeting the question of a merger with Atron came up without prearrange-

ment and without prestudy?

A Well, you say prestudy. You know, we were stockholder of Atron. We received their public information, we received their stockholder's report, we received their quarterly reports, we had conversations with them for some time and we were pretty well informed as to the progress that Atron was making so, to that -- if that is studying, then we had done some studying.

Q Had there been any study before the meeting of the ratio or terms of a merger exchange of stock?

A Not by me there hadn't.

Q To your knowledge had there been any such study by anyone on behalf of Mohawk?

A Not to my knowledge.

Q During that meeting, did the question of a merger between Atron and Mohawk arise?

A Yes. As I recall fairly early in the meeting.

Q Who raised that question?

A I don't remember. It was probably Mr. Rifenburg.

Q Who was present at the meeting?

A Mr. Rifenburg and myself for MDS and then Mr. Stoutenburgh was president of Atron, Mr. Dennis Stengen, who was vice president and treasurer of Atron and Mr. Mark Trostom, who was vice president for marketing or something

like that of Atron and all these people were founders and I believe on the board and from the top officers of Atron.

Q After Mr. Rifenburg raised the subject of a merger, was the basis or the ratio of the stock exchange which was to occur at such a merger discussed?

A Well, as I recall, we had conversations about the desirability of the merger, where we looked primarily where Atron was. Atron was in a very pivotal period because they had been in existence about two years, they had been unable to make any impact on the market other than sales directly to MDS, which I think we accounted for almost 90 percent of their sales. They were almost a captive manufacturing arm of MDS and under the contract we had the right, when we reached certain levels of product where we could take over the manufacturing of these products for a very nominal sum.

We discussed all this. The problems that MDS had had over the years and there had been many and that Atron was starting down the same track and, while they had $3,000,000 of cash it was a drop in the bucket if they were going to establish a marketing and service organization to go to the end user.

So, we had discussions of the relative aspects of each other's business, we did not have any discussion of ratios until it was agreed that we ought to think about a

merger and then, as I recall, Mr. Stoutenburgh says, "Well, why don't the three of us go next door," the three Atron people, "and why don't you guys talk and let's see what we might do about a ratio."

Q Following this caucus, how did the discussions with respect to merger ratio proceed and conclude?

A As I recall, while they were out, Mr. Rifenburg and I discussed the ratios in some detail. I had forgotten the price that Atron was selling on the market at that time but it was about one-fourth of MDS. I took the position that they were overpriced in the market place, they had not established any ongoing business, they were really only worth as much as their assets and mostly the biggest asset was cash and so it had no real earning power here to look at but, unfortunately, it was a real world and the real world is the market values that the public puts on these things and I said to Mr. Rifenburg, "My recommendation would be that we do it almost precisely upon market value and that we -- while I think it's overpriced, it is a small transaction, the number of shares that might be on the high side is limited and let's not have any argument, let's get on with it and let's offer this as a deal," and Rifenburg said, "You know, I hear everything and I think that makes sense."

So that was our position.

Q At the time of the January 29th meeting, did you know what percentage of Atron's outstanding common stock was restricted as to transfer?

A No.

Q Did anyone mention that at the January 29th meeting?

A Not that I recall.

Q Was there any discussion at that meeting of the effect that the merger would have on holders of restricted Atron stock?

A Not that I recall. If it did come up, if it did come up, I am sure, nothing Mr. Rifenburg and myself, we would have taken a position it was a legal matter and a S.E.C. problem, you know, that's for somebody else to decide.

Q Did anyone from Atron state at that meeting that they expected that the Mohawk stock to be issued as a result of any merger would be freely transferable?

A Not that I recall.

Q You don't recall Mr. Stoutenburgh saying anything to that effect?

A Not that I recall, no.

Q At the time of the January 29th meeting, did you know that any of Atron's outstanding stock was restricted as to transfer?

A We were a stockholder and I knew our stock was

legended and restricted.

THE COURT: "We" being who?

THE WITNESS: MDS.

A So I had knowledge that there was restricted stock.

Q Well, the effect of the merger on Mohawk, of course, was to cash in Mohawk's stock, wasn't it?

A It was as if there is no Mohawk stock outstanding for that.

Q The Atron stock hold by Mohawk would be canceled as a result of the merger, isn't that correct?

A Yes.

Q And, therefore, Mohawk need not have been concerned at that time as to whether or not the restrictions on its Atron stock would continue after the merger or not, is that correct?

A As I recall, we had some of the pension fund and I believe that was restricted and we would be concerned that that is free stock.

Q Did you discuss that at the January 29th meeting?

A Not that I recall.

Q Do you recall whether that was something about which you were concerned at that time?

A No, not that I recall.

THE COURT: Gentlemen, I'll take a ten minute recess

at this time.

(Recess)

W A Y N E W E L L S, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. DEVINE:

Q At any time between the January 29, 1971, meeting and April 30, 1971, the effective date of the merger, did you discuss with anyone the question of whether holders of Atron restricted stock would receive freely transferable Mohawk stock?

A Not that I know of and if I did, it was a very casual conversation that would have nothing to dowith the rights or the wrongs. It was just very casual.

Q In that period did you have any discussions with any officer or director of Atron regarding that question?

A No, not that I recall.

Q Did you have any conversation with any attorney whether it be Atron's attorneys or Mohawk's attorneys with respect to that question?

A No, not that I recall.

Q Between January 29, 1971, and April 30, 1971, did you have any knowledge as to Mr. Stoutenburgh's belief on whether or not the Mohawk stock to be issued in the merger would be freely transferable, with particular reference to the

holders of Atron restricted stock?

MR. UNGER: Objection, your Honor. There is no testimony as to whether or not Mr. Stoutenburgh had a motive, a belief with respect to this restricted stock.

THE COURT: He may ask if he had any discussions but he has already told us he recalls no discussions.

Did you have any such discussions?

THE WITNESS: With Mr. Stoutenburgh, no.

Q You did not know Mr. Stoutenburgh's belief on this subject, if he had one?

A No.

Q Focusing on April 30, 1971, the effective date of the merger, did you on that date have a belief one way or the other as to whether or not the Mohawk stock to be issued to holders of Atron restricted stock would be freely transferable?

A As I recall, I had not even considered the question.

Q I show you Plaintiff's Exhibit 20 for identification and ask whether you have seen that letter before today.

THE COURT: What is the date of it?

MR. DEVINE: May 26, 1971.

A I don't recall seeing this letter before.

Q I take it then that you have no knowledge as to who drafted that letter or how it came to be written, is that

correct?

A Well, I see Mr. Ablove's name on it and I assume that he is the one that drafted it.

Q You had no discussions with Mr. Ablove regarding the content of that letter, is that correct?

A Not that I recall.

Q Well, do you recall any discussions after April 30, 1971, but before the writing of that letter with anyone regarding the question of whether or not Mohawk could, should or would issue freely transferable stock to the holders of Atron restricted stock?

A No.

Q Prior to the writing of the May 26th letter which is in front of you, did you have any discussions with Mr. Rifenburg regarding the advisibility of registering Mohawk stock which had been received by holders of Atron restricted stock? When I say "registering," I mean registering for sale under the Securities Act of 1933.

A As I recall, the only discussion we had as to whether we had any objection to registering the stock and I thought -- I think it was the belief of the two of us that we had no such objection and since we were going to have an effective registration statement anyway there was no problem and we might as well register it.

Q Had there been any discussion which involved you prior to April 30, 1971, and the possibility of registering the Mohawk stock which was to be issued to the holders of Atron restricted stock?

A Not that I recall.

Q This discussion occurred after April 30th and there had been no similar discussion prior?

A Not that I recall. This is -- as I recall the discussion, it was at the time when we were considering the question of permitting them to register the stock and I recall that Rifenburg and I had a very short discussion and could see no objection, might as well do it.

Q You testified earlier that the reports regarding the rate of lease terminations were distributed to, I believe you said, the high-ranking officers of Mohawk, is that correct?

A I think I probably said senior management, yes.

Q Did that include Mr. Karpen?

A Yes, it would.

MR. DEVINE: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. UNGER:

Q Are you a certified public accountant?

A Yes.

Q When did you become a certified public accountant?

A In 1949.

Q On January 29, 1971, did you have any expectation as to when the Atron merger might be -- as to a date by which the Atron merger might be accomplished?

A Well, I think we had some discussion as to when we could process a proxy statement and get it finalized and my feeling was that it should be a fairly simple matter and could be done very expeditiously and I thought in terms of sixty days.

MR. UNGER: No further questions.

THE COURT: Any redirect?

MR. DEVINE: No redirect, your Honor.

THE COURT: You are excused.

(Witness Excused)

MR. DEVINE: Your Honor, we call Harvey Wertheim.

H A R V E Y W E R T H E I M, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEVINE:

Q Are you associated with Research and Science Investors, Inc.?

A Yes, I am vice president and treasurer of the

company and I've held that title since November of 1969. I am also a director of the company and have been a director for approximately the last two years.

Q What is the business of Research and Science Investors?

A We are a privately held investment company specializing in venture capital investments, usually in high technology, computer industry, chemical industry, health-medical industry, things of that nature.

Q Is John French associated with Research and Science Investors?

A Yes. He is the president of the company, he is also a director and he has been -- has held both of those positions for approximately somewhere between twelve and thirteen years.

Q Are you the custodian of the books and records of Research and Science Investors?

A Well, custodian is probably not the correct --

THE COURT: Is this disputed? What are we trying to prove here?

MR. DEVINE: Your Honor, I am only trying to qualify very quickly Mr. Wertheim because he will testify to some things which he knows only from the records of the company.

THE COURT: All right. Are they matters in dispute?

MR. DEVINE: With respect to these two plaintiffs, yes, there is some dispute, your Honor.

THE COURT: All right.

A One of my responsibilities at Research and Science Investors is total responsibility for all the books and records.

THE COURT: All right. He is a vice president and treasurer. I'll take his testimony. He has got custody in law.

Q Did there come a time in 1969 when Research and Science Investors purchased common stock of Atron Corporation?

A Yes. It was approximately January of 1969.

THE COURT: Don't you have books? Where are these records we are talking about?

THE WITNESS: Yes.

MR. DEVINE: I don't intend to offer any records at this time.

THE COURT: Well, let's move along here.

Q Was the stock which Research and Science Investors purchased in January of '69 in Atron Corporation restricted in any way?

A Yes. It was not, the stock was registered pursuant to the '33 act and it had a restrictive legend on the back of it.

* * *

* * *

the fall of 1969? Was there a transfer of those certificates to the name of Intercontinental Technology's nominee or the nominee for its custodian?

A Yes, there was. ITNR has a custodian here in New York, it's a bank, the bank is Schroeder Trust. Schroeder Trust uses a nominee name which is Boyden Company. As soon as Intercontinental was officially formed, the stock was, as was written in these letters, transferred to the name Boyden Company and at that same time, Intercontinental repaid to Research and Science Investors the amount that it had laid out on its behalf.

Q Was the stock of Intercontinental Technology restricted in any way, the stock in Atron Corporation?

A Yes. Precisely the same way as the -- I say precisely -- conceptually. I don't know if the legends are the same but --

Q Did there come a time when Research and Science Investors received a copy of the proxy statement of Atron dated April 16, 1971, a copy of which is in front of you as Plaintiff's Exhibit 18?

A Yes.

Q When to the best of your knowledge did Research and Science Investors receive a copy of that?

A Shortly after the date of the proxy. Probably

within three or four days I would guess. I can't remember the specific date it came into the office.

Q Was that proxy statement read by any of Research and Science Investors' officers?

A It was read by me, that's for sure, and I discussed it with John French, so I would, therefore, assume that he read it.

Q To the best of your knowledge, on April 30, 1971, did the officers and directors of Research and Science Investors believe that both the Research and Science Investors and the Intercontinental Technology, that both of those entities would receive unrestricted Mohawk stock if the proposed merger was approved?

A Yes, we did, in fact. I could refer to the document but there is absolutely nothing in the document that would indicate otherwise and from my personal experience in this business, when one receives restricted stock in exchange for other common stock it's very clearly stated and in such a document might be typed in bold caps and underlined once or even more than once because of the, of how important a transaction like this normally is, so from a medical point of view I assumed that we were getting free stock. Now, I had certain discussions with John French. He had discussions with others and we were rather pleased that this was the case

because the securities laws at the time were somewhat vague and I think there is one particular law, rule 133, which is, the whole area is rather gray and as I say again, when such things are so gray, one expects if you are going to get restricted stock that it's going to be very clearly highlighted because it's an extremely important factor in making an evaluation of whether or not you want to enter into such a transaction.

Q Did there come a time after April 30, 1971, when Research and Science Investors placed an order to sell the Mohawk stock which it had received in the merger?

A Yes. I believe it was just shortly after the middle of the month, middle of May, 1971, that we placed orders to sell the stock.

Q At that time, did Research and Science Investors believe that its Mohawk stock was unrestricted?

A Well, of course. I mean, if we believed otherwise, we would be violating our own charter. We are not permitted to sell short and it would be a direct violation of our own business ethics.

Q Did there subsequently come a time when Research and Science Investors learned that its Mohawk stock was restricted?

A Yes. We received a letter from Mohawk, I think the date was May 25th or 26th, indicating that this was restricted

stock.

Q Did there come a time when sale of the Mohawk stock which had been received by Research and Science Investors in the merger was registered for sale by Mohawk?

A Yes.

Q Do you recall when that was?

A I believe in August of the same year.

Q 1971?

A Yes.

Q Did Research and Science Investors sell its Mohawk stock under the registration statement at that time?

A Yes, it did. I believe we sold all the stock in the middle of November of '71 for about $40,000, I think, in that range.

Q Could the stock in Mohawk which in August of 1971 was owned by Intercontinental Technology also have been sold under that Mohawk registration statement?

A Yes, it could have.

Q Was it?

A No, it was not.

Q Is that stock still held by Intercontinental Technology at this time?

A Yes. All of it is.

Q And does that stock continue to be restricted at the

present time?

A Yes, it is.

Q Why was it that the stock of Intercontinental Technology was not included in that registration statement and sold in August of 1971 or in succeeding months?

A The answer to that is a somewhat length story.

Q Try and make it brief, if you can.

A Okay. We, as a matter of course make -- we as Research and Science make recommendations to the Luxembourg company regarding investment decisions.

And to the best of my knowledge, we recommend that they include the stock in the registration statement. Somehow through the cables going back and forth across the ocean, it was never received or Mohawk claimed they never received it.

We learned that when we saw the registration statement. We saw that our name was included but the stock of Intercontinental Technology was not included.

As soon as we saw that, we called the company, I spoke to in-house counsel, I believe the name was Walters, and he told me, "Well, as far as I am concerned we think we can squeeze it in. Talk to Mr. Rosen at Beekman and Bogue."

So I called Mr. Rosen and told him what the problem was and he said, "Well, we are going to be effective tomorrow

morning, we are going to press tonight. It involves too much of a change and we can't do it."

So, the request was declined at the last minute and the stock was never sold.

Q When you read the proxy statement which is Plaintiff's Exhibit 18 for identification, did you read the Mohawk financial information which is contained in it?

A Yes, I did but it's a long time.

Q With particular reference to pages sixteen and seventeen, did you read those pages?

A Yes.

Q Prior to April 30 of 1971, did you consider the financial information regarding Mohawk which is contained in the proxy statement to be important to the bulk of RSI and Intercontinental Technology?

A Well, as a certified public accountant licensed to practice in New York State, one of my primary responsibilities --

THE COURT: Can't you just tell the man yes? Yes or no? Did you consider it important?

A Yes, it was extremely important.

Q Why was it important?

A The earning power of the company would dictate its value and this was rather important in determining whether or not one share of Mohawk for four of Atron was, in fact, a

fair deal.

Q On April 30, 1971, did you know that Mohawk would restate downward its 1970 sales and income figures?

A No, I did not.

Q On April 30, 1971, did you know that on the 4th of May, 1971, Mohawk would announce changes in its accounting practices?

A No, I did not.

Q If, on April 30, 1971, you had known that on May 4, 1971, Mohawk would announce changes in its accounting practices which would cause downward restatement of 1970 sales and income figures, would that knowledge have affected the vote of Research and Science Investors or Intercontinental Technology with respect to the merger?

A It could have.

MR. DEVINE: I have no further questions of this witness.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. UNGER:

Q Mr. Wertheim, how many proxy statements have you seen that have in bold letters across the front of it that the holders of restricted stock of the company that is being merged are going to get restricted stock of the other company?

MR. DEVINE: Objection, your Honor.

THE COURT: Well, it was opened up on direct examination. I'll permit an answer.

A I never stated across the front of it in the first instance but the answer to your question is that within the proxy statement, I have seen several.

Q Tell me what companies, the ones that you have seen.

A I can't recall offhand. I would have to search our files.

Q Are you aware that Research and Science Investors signed a stock subscription agreement at the time it bought Atron stock in January of 1969?

A Yes, I am.

Q Did you see that agreement? Have you seen it?

A Yes, I have.

Q You are the custodian of the general records of Research and Science Investors?

A Yes, I am.

Q Incidentally, were you an officer of Research and Science Investors back in January of 1969?

A No. I was not affiliated with the company.

THE COURT: When did you become affiliated?

THE WITNESS: November, 1969.

* * *

* * *

September, 1969, placement that were transferred into the name of Schroeder Trust Company or its nominee, which was ITNR's nominee?

MR. DEVINE: I object. All of those documents have been marked here and admitted by stipulation.

There is no question as to that transfer.

THE COURT: Well, if there is no question as to that transfer, why is this man called?

MR. DEVINE: I called this man just for the very basic information I solicited.

THE COURT: He may show the documents that evidence the transaction if they are in evidence.

MR. UNGER: I don't want to see them. I want him to tell me what documents he has been talking about in his testimony.

THE COURT: If the documents are in evidence, and they show the transfer, let's not debate it.

Q Did Research and Science Investors get a letter of investment intent from ITNR in connection with that transaction?

A At the time that the transfer was made -- actually, I can't remember that. I can't remember that.

Q It didn't, did it?

A I said I can't remember it.

THE COURT: They are offshore, aren't they?

THE WITNESS: Yes.

THE COURT: Do they have to sign such a letter?

THE WITNESS. Yes, they would. The custodian here in New York would have to sign such a letter. If they had bought it direct, if the company was in existence, let's say in September, the custodian here in New York would sign the letter. This is what we do on a regular day-to-day basis. We, in fact, signed the letter for them at that time.

THE COURT: All right.

Q Now, Mr. Wertheim, I think you may have Plaintiff's Exhibit 18 in front of you, that's the proxy statement.

Is there anything in that proxy statement that would indicate to you that Research and Science Investors or ITNR was going to get Mohawk stock on the merger that would be free of the restrictions on transfer that were on the Atron stock certificates?

A No, nothing in the proxy statement.

Q Was it your job in April of 1971 to review the proxy statements as they came into Research and Science Investors?

A Yes, it was.

Q And you also --

A I was not the only person that had that responsibility

but that was one of them.

Q And Research and Science Investors also reviewed proxy statements on behalf of ITNR?

A That's correct.

Q And with respect to the particular proxy statement you have in front of you, the Atron proxy statement, did you review that particular one?

A Yes, I did.

Q For both Research and Science and ITNR?

A Yes, I did.

Q I gather you read it carefully?

A Yes, in April of 1971 I read it carefully.

Q Let me show you Plaintiff's Exhibit 5 in evidence and direct your attention particularly to paragraph 7A and B and also to the letter which is part of that exhibit that is dated January 15, 1969.

Have you read that?

A Not yet.

THE COURT: What is the question?

A I have read it.

Q Were you aware of that particular stock purchase agreement, Plaintiff's Exhibit 5, at the time you read the proxy statement?

A Yes.

Q Were you aware of the language in paragraph 7A and B in that document?

A Yes, I was.

Q And were you also aware that Research and Science Investors had given a letter to Atron which is also part of Plaintiff's Exhibit 5, the letter dated January 15, 1969?

A Yes.

Q And you were aware what that letter said?

A Yes.

Q In September, 1969, Mr. Wertheim, did ITNR have any money?

THE COURT: What possible difference could it make?

MR. UNGER: Whether they could, in fact, have purchased the stock as the testimony goes, if they didn't have money.

THE COURT: You have to have money to purchase stock? Did they have any money?

THE WITNESS: ITNR as an entity unto itself was in the process of raising money.

Q So, Research and Science Investors paid for the stock, it was Research and Science Investors' money?

A That's correct.

Q Let me show you Plaintiff's Exhibit 7 and direct your attention to the number seven of that document and just

ask you to read that.

Were you aware of that particular document at the time you received the Atron proxy statement?

A Yes.

THE COURT: Is it a document signed by somebody? Who signed it?

MR. UNGER: It's signed by Research and Science Investors, your Honor.

THE COURT: So they have actual notice of it, don't they, whether he was aware of it or not. Let's go on.

Q Now, the stock that was purchased in the September, 1969, private placement, was that originally issued in the name of Research and Science Investors?

A Yes, it was.

Q And it was subsequently transferred to a nominee, is that correct?

A That is correct.

Q Did you find any language in the proxy statement that would indicate to you that the conditions of either one of those subscription agreements, Plaintiff's Exhibit 5 or 7, was being waived by Mohawk in connection with the merger?

A No, I did not.

Q Did you find any language in the proxy statement that would indicate to you that Mohawk was not going to

enforce any rights it may have with respect to those agreements if the merger became effective?

MR. DEVINE: Your Honor, I object to that.

A No, sir.

MR. DEVINE: Mohawk was not even a party to those agreements.

THE COURT: Well, I assume he means Atron.

MR. UNGER: Mohawk on the merger takes all the assets and liabilities of Atron.

THE COURT: You see the questions are argumentative. And Mohawk doesn't -- it was MDS-Atron. If they sign a document, they have no reason to think that the document doesn't say what it says.

Q During the period after the merger became effective and when Research and Science Investors learned that the stock was not free of restrictions, did it seek any opinion of counsel with respect to obtaining a letter that they could sell the stock even though it had the restrictions on it?

Let me rephrase that.

After Research and Science Investors learned that it had received Mohawk stock that contained a legend and bore transfer restrictions, did it seek any opinion of counsel with respect to the removal of those restrictions?

A We had already placed the sale for the shares before

we ever received such a letter, so it's almost impossible to answer the question.

THE COURT: Well, there came a time when you found that there was a problem with the legend on the securities, isn't that so?

THE WITNESS: Yes.

THE COURT: And all he is asking you is when that came to light, did your company do anything about attempting to obtain an opinion of counsel which would permit you to sell free of the restriction, isn't that the question?

MR. UNGER: Yes.

THE COURT: Can't you answer that? Can't you answer it yes or no?

THE WITNESS: No.

THE COURT: All right. I am going to have to break for the day. Is there anything more for this man?

MR. UNGER: Just a very few moments.

(Pause)

MR. UNGER: No further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. DEVINE:

Q When in 1971 Research and Science Investors learned that there were restrictions on the Mohawk stock which it had

received in the merger and you have just testified that at that time no opinion of counsel was sought with respect to a sale of that, had you by that time, meaning Research and Science Investors, received the May 26, 1971, letter from Mohawk which indicated that there would be a registration statement for the shares?

A Could you say that again, please?

(Record read)

THE COURT: Reframe the question.

Q I show you Plaintiff's Exhibit 20 for identification which is a letter of May 26th and I ask whether Research and Science Investors received a copy of that letter.

A Yes, we did.

Q And was that how Research and Science Investors learned that the Mohawk stock received by it in the merger was restricted?

A That is correct.

Q And does that letter indicate that Mohawk would register that stock for sale?

THE COURT: Please. It speaks for itself, the letter.

MR. DEVINE: No further questions.

THE COURT: Anything further?

RECROSS EXAMINATION

BY MR. UNGER:

Q Did you in the course of time that Research and Science Investors held the Atron stock, receive the various reports published by Atron with respect to its annual reports, proxy statements and so on?

A Yes, we did.

THE COURT: All right.

You are excused.

(Witness Excused)

THE COURT: 9:45 Wednesday morning, gentlemen.

(Court adjourned)

TRANSCRIPT OF PROCEEDINGS

[Caption and Docket No. Omitted] Filed: August 19, 1974

New York, New York, February 13, 1974

Honorable Charles L. Brieant, District Judge

APPEARANCES OF COUNSEL:

For Plaintiffs: Michael C. Devine, Esq.

For Defendants: Martin P. Unger, Esq.
Milton Weiss, Esq.
Kenneth A. Raskin, Esq.

* * *

February 13, 1974

10:00 AM

* * *

MR. DEVINE: I only did this for the witness' convenience, your Honor.

Q On April 19, 1971, were you Mr. Le Landais' secretary?

A Yes, I was.

Q Now, you are looking at Plaintiff's Exhibit 29 marked for identification and I would ask that you direct your attention to the line on that page which is marked with an "X" inside a circle. Would you tell us, please, what the name is which appears on that line and what the shorthand is that appears after the name?

A The name is Stoutenburgh and the shorthand reads, "Re: Proxy material."

THE COURT: Re, R - E?

THE WITNESS: That's right.

Q Did you keep this page of Mr. Le Landais' diary in the regular course of your duties as his secretary on April 19th of 1971?

A Yes, I did.

MR. DEVINE: I have no further questions.

THE COURT: Any cross examination?

Is this an entry you, yourself, made?

THE WITNESS: Yes.

THE COURT: Did you make it as a result of something Mr. Le Landais told you at or about the time you made the entry?

THE WITNESS: No, sir, I made it as a result of what the gentlemen, Mr. Stoutenburgh, said to me on the telephone.

THE COURT: Does this show a call from Mr. Stoutenburgh to Mr. Le Landais?

THE WITNESS: Yes.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. UNGER:

Q This is a call from Mr. Stoutenburgh to Mr. Le Landais?

A Yes, sir.

Q Was Mr. Le Landais there when the call came in?

A I don't recall.

MR. UNGER: No further questions of the witness.

THE COURT: Let me understand this clearly. Mr. Stoutenburgh called and you answered. Is that what happened?

THE WITNESS: Yes.

THE COURT: You and Mr. Stoutenburgh had a conversation?

THE WITNESS: Yes, sir.

THE COURT: What was the substance of the conversation?

THE WITNESS: Mr. Stoutenburgh called and asked for

Mr. Le Landais and said he wanted to speak to him with regard to proxy material.

THE COURT: You said thank you, I will tell him?

THE WITNESS: Yes.

THE COURT: And that is the end of it?

THE WITNESS: Yes.

THE COURT: Anything further for this witness?

MR. DEVINE: No, your Honor.

THE COURT: You may step down, Miss Kane.

(Witness Excused)

MR. DEVINE: Your Honor, I call Richard Karpen.

R I C H A R D L. K A R P E N, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEVINE:

Q Mr. Karpen, are you employed at the present time?

A Yes, sir.

Q By whom?

A Mohawk Data Sciences Corporation.

Q When did you begin that employment?

A Well, August, '67.

Q From January 1st of 1971 through April 30, 1971, were you a director of Atron Corporation?

A January 1, 19 which?

Q '71.

A Through what?

Q April 30, '71.

A Yes, sir.

Q During that same period, were you also an officer of Mohawk?

A Yes, sir.

Q And what office did you hold at Mohawk during that period?

A That particular period of time I was executive vice president of the manufacturing and engineering group.

Q Can you recall how many directors' meetings of Atron you attended during your tenure as a director?

A I think it is around three or four but I cannot sit and guarantee that statement.

Q Were any of those meetings held at the offices of Mohawk?

A Not to my knowledge.

Q During Mohawk's fiscal year, which ended in 1971, did you receive reports on the rate at which leases on Mohawk equipment were terminating?

MR. UNGER: Objection, your Honor.

THE COURT: Hasn't it already been testified to

* * *

* * *

THE COURT: Read the question back, please.

(Record read)

A I received reports, verbal-type reports that, yes, we had certain type of equipment that we were selling to third party leasers and obviously I am knowledgeable about termination of MDS leases in any case in user applications.

Q Do you recall at what rate during fiscal 1971 leases were terminated?

A No, sir.

Q Do you recall whether the rate of termination exceeded Mohawk's expectations?

A I can't answer that. I do not know.

Q During Mohawk's fiscal 1971, were you present at any conversation at which a change of Mohawk's fiscal year was discussed?

A During 1971?

Q Fiscal 1971.

A Well, define that beyond April -- at the board of directors' meeting in June, I did, in 1971, yes.

Q Were you present at any conversation before that June board meeting at which the change in Mohawk's fiscal year was discussed?

A No, sir.

Q When did you learn that Mohawk had changed its

fiscal year 1971?

A At a board meeting.

Q Was that the June board meeting?

A That's right.

Q You did not know it before that time?

A I did not. You know, the board of directors usually requires approval of things. You have to pass a resolution to pass certain things on the board of directors. The changing took place at a board meeting. It was approved.

Q Mr. Karpen, I am showing you the third page of Plaintiff's Exhibit 16 which are the minutes of a board meeting of Mohawk in March of 1971 which recite your presence. Read the last paragraph of that page. The question is: does that refresh your recollection as to whether or not you were party to any discussion prior to June of 1971 involving the possible change of Mohawk's fiscal year?

A The fiscal year, yes. Should we change the fiscal year? Yes, that is a possibility. We did discuss things like that.

THE COURT: You have no question but that those minutes are correct, do you?

THE WITNESS: That is correct.

THE COURT: If the minutes show the man was present and it was discussed, I don't need any more evidence on the

subject.

Q Do you recall at the March 1971 board meeting of Mohawk what was said about the reasons for considering a change in the fiscal year?

A If there was anything said? No, I really don't think I recall too much of the discussion.

THE COURT: Why did they change the fiscal year?

THE WITNESS: I think it had something to do with the merger of Atron, possible merger of Atron into MDS. I am not knowledgeable on all the facets of finance. I am vice president of engineering and manufacturing. I don't pay too much attention to the financial aspects. I am the expert in the technical areas.

Q During Mohawk's fiscal 1970 and 1971, were you aware of Mohawk's method of accounting for sales of equipment which previously had been leased?

A Yes, I think so. Yes.

Q Prior to April 30th of 1971, had you had any discussions with anyone concerning the appropriateness or propriety of that method of accounting?

A Not that I am knowledgeable of, sir.

Q Prior to April 30th of 1971, did you know that Mr. Wells and representatives of S. D. Leidesdorf were discussing the appropriateness of this method of accounting?

A No, sir.

Q Prior to April 30, 1971, did you know that Mohawk was considering setting up reserves for certain accounts receivable, inventories, and off-rent equipment?

A I believe I can recall some discussions on it but no action or anything to that extent. Yes, I think I do recall some discussions there, but that's about all I can tell you.

Q Do you recall who was involved in those discussions?

A Well, I think all I've heard is that there was a meeting of that sort. I was not on the executive committee. It may have happened in an executive committee meeting. I am not a member of the executive committee. I am an alternate.

Q Between January 29, 1971, and April 30, 1971, did you know approximately what percentage of Atron's outstanding common stock was restricted as to transfer?

A To state a number exactly, no. I know there were certain restricted stock. I don't know what the percentage was.

Q At that time in early 1971, did you know whether it was more or less than 50 percent of the outstanding stock?

A I will make an assumption. I think it was more but I do not know.

Q Between January 29, 1971, and April 30, 1971, did

you have a belief as to whether the holders of Atron restricted stock would receive freely transferable Mohawk stock if the merger was approved?

A Say that question again.

THE COURT: Read the question back, please.

(Record read)

A To my knowledge, no. Furthermore, if we're on the subject of legend stock, happening to know a bit about the Atron Corporation, having most of those people being my friends in Univac and knowing a few things about stock, but not that much, being an engineer type, I know that it's normal to take maybe three years, and a lawyer or something has to approve or S.E.C. has to approve to take that legend off. So my comment to you is I wouldn't even consider such things as that. That's all I know.

Q Well, is it a fair statement of your testimony that in this January to April, 1971, period you had no belief, yes or no, as to whether free stock would be issued to holders of restricted Atron stock?

A I had no idea one way or the other. I would have made the assumption they would not get free stock. Just knowing the laws and common practice, S.E.C.

Q Did you discuss this subject with anyone during this period?

A No, sir.

Q Did you consider this subject during that period?

A No, sir.

Q Did there come a time when you learned that holders of Atron restricted stock did not receive freely transferable Mohawk stock in the merger?

A Well, I guess when you asked me the question in the deposition I did. I didn't pay much attention to it prior to that.

Q When you learned that Mohawk was to restate downward its 1970 and 1971 sales and income figures, did you take any action as a director of Atron?

MR. UNGER: Objection, your Honor.

THE COURT: Well, it assumes a state of facts not in evidence. There came a time obviously when he learned they were going to do that.

MR. UNGER: There is no testimony as to when though.

THE COURT: That's right. Objection is sustained.

Q When was it that you learned that Mohawk was to restate downward certain 1970 and 1971 figures?

A At a board of directors' meeting.

THE COURT: He asked you when, when.

THE WITNESS: At a board of directors' meeting, June -- the board of directors' meeting in June, 1971.

* * *

Q At the June, 1971, meeting of Mohawk's board, was the discussion concerning change in accounting methods in part based upon a similar situation that had occurred with respect to Memorex?

A There was --

MR. UNGER: Objection, your Honor. The witness is characterizing a Memorex situation.

THE COURT: It's more than that. It's after April 30th and if it's in the directors' minutes I don't know why you are wasting your time.

MR. DEVINE: It's not in the minutes but this witness testified at pretrial about it.

THE COURT: I will let him answer.

A There was a discussion in the board of directors' meeting about third party leasing and that we did sell equipment to third party leases and took it as a sale.

THE COURT: This was in June?

THE WITNESS: In the June board of directors' meeting, MDS board of directors' meeting.

We did discuss the accounting practices or principles, whatever you want to call that, and the problems they were having and their position regarding Memorex, Memorex's wholly owned leasing subsidiary where the manufacturing group sold equipment to a subsidiary of their own at full

book value and then they would remarket, and they took it as a sale. The accounting principles board said this is kind of like one of those gray areas like a "no no." Should we, Mohawk, do that kind of a thing, and we said we are a more conservative company than that and we should not do those kinds of things. I think that was part of the situation that decided at that meeting we should take them not as sale but lease and, therefore, restate.

Q Who was it that described the Memorex situation?

A Mr. Wells.

Q Mr. Wells?

A Yes, very briefly. That was in the papers anyway, all over the trade journals. You don't have to go through a lenthy discussion on it. It was all across all the papers, technical journals for six months.

Q Six months prior to June?

A I am making an assumption. At least I was aware of that kind of thing for at least six months.

Q At the June, 1971, board meeting, was the dollar impact of the proposed changes discussed?

A Briefly, yes.

Q What, to the best of your recollection, was the impact?

A I believe it was around a million and a half or a

million dollars, in that range.

Q Of net income?

A Yes.

Q One last question, Mr. Karpen.

Did you as a director of Mohawk vote on the proposed merger agreement between Atron and MDS-Atron?

A Yes. In the sense I was at the meeting and they called for any negative responses. I did not respond and, therefore, I voted for the merger of MDS and Atron.

MR. DEVINE: No further questions.

THE COURT: Any cross examination?

MR. UNGER: No questions of the witness, your Honor.

THE COURT: You are excused, Mr. Karpen.

(Witness Excused)

THE COURT: Call your next witness, please.

MR. DEVINE: I call Pierre Le Landais.

P I E R R E J. L E L A N D A I S, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: We will take a very brief recess.

(Recess)

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. DEVINE:

Q Mr. Le Landais, what is your present employment?

A I am a managing director of Radix Organization, Incorporated, 375 Park Avenue. R-A-D-I-X.

Q Very briefly, what is the business of that company?

A That provides investment banking services, specializing in developing, structuring and carrying through what you might call high risk, high reward private investments for sophisticated investors.

Q I should ask you, you are one of the plaintiffs in this case. Is that correct?

A I am, yes, on my own behalf and on behalf of my company, Pierre J. Le Landais and Co., Inc.

Q What is your association with that corporation?

A Pierre J. Le Landais and Co., Inc., was initiated by me in 1965 to provide the same services as Radix when I operated on my own, and since then it has been dormant except that it holds a few investments.

Q I believe you have before you Plaintiff's Exhibit 29 for identification. Is that page marked April 19th, Monday, is that the original of the diary page for your business affairs on April 19, 1971?

A That's correct.

THE COURT: That has already been proven to my

satisfaction. Please don't give me cumulative evidence here. Time is precious in this court. You already had a witness who came up here and identified this diary, told about the entry. She wasn't cross examined. It's not in issue. I will find it's his diary. Please.

MR. DEVINE: I offer Plaintiff's Exhibit 29 in evidence, your Honor.

MR. UNGER: Objection.

THE COURT: Overruled.

xxx (Plaintiff's Exhibit 29 received in evidence.)

Q In late 1968 and early 1969, what employment did you have?

A I was then a voting stockholder, which is the equivalent to being a partner, vice president, director of a firm by the name of Stralem and Co., Inc., members of the New York Stock Exchange.

Q At about that time, late 1968, early 1969, did you learn of Atron Corporation?

A Yes, I did.

Q And how did you learn of that corporation?

A Through Mr. John Halsey.

Q In January of 1969, were you involved in a private placement of Atron Corporation common stock?

A I did a private placement on behalf of Stralem and

Co., S-T-R-A-L-E-M.

Q Did certain of the plaintiffs in this action purchase Atron stock in that placement?

A Yes.

Q What employment did you have in September of 1969?

A I had become a partner of a firm by the name of Hamerschlag, Borg and Co.

Q In September of 1969, were you involved in a second private placement of Atron common stock?

A I managed that second private placement on behalf of Hamerschlag, Borg and Co.

Q Did one of the plaintiffs in this action purchase Atron stock in that placement?

A Yes, it did.

Q And which one of the plaintiffs?

A Intercontinental Technology and Natural Resources.

Q At the time of that placement, did Atron have knowledge that the purchaser of that stock was Intercontinental Technology and Natural Resrouces?

MR. UNGER: Objection.

THE COURT: I will allow that. You can cross examine him as to how he had his knowledge. This man was an Atron director at that time. Is that so?

THE WITNESS: That's correct.

Q I show you Plaintiff's Exhibit 32 for identification. I ask if that is a true copy of a letter which you received on or about September 17, 1969.

A It is.

Q To the best of your knowledge, did Joseph Stoutenburgh sign that letter in the margin?

A He did at the closing.

MR. DEVINE: I offer Plaintiff's Exhibit 32 in evidence, your Honor.

THE COURT: Is there an objection?

MR. UNGER: No objection, your Honor.

THE COURT: It will be received in evidence.

xxx (Plaintiff's Exhibit 32 received in evidence.)

Q You have testified as to two private placements of Atron common stock. Was the stock purchased by the plaintiffs in this action in those two placements restricted in any way?

A It was.

Q And were the certificates legended?

A They were.

Q Did the restriction on the stock purchased by the plaintiffs have to do with the transfer, transferability of the stock?

A Well, basically when a stock is legended, the way

these certificates were, it means that the purchaser purchases for investment purposes only and that he cannot make a public sale or public distribution or public disposition except under certain circumstances which are fairly well prescribed.

Q In 1969, were you a member of the Atron board of directors?

A It depends when in 1969. I think I became a director of Atron in March of 19 -- I think in March of 1969.

Q When did you resign?

A June 10, 1970.

Q During the time that you were on the board of Atron, did the Atron board ever formally discuss a merger with Mohawk?

A Well, first much to my --

THE COURT: Can't you answer yes or no? You either discussed or didn't, while you were a director.

A There were no formal board of directors' meetings.

Q After you left the Atron board of directors, did there come a time when you heard of a proposed merger between Atron and MDS-Atron?

A Repeat that question, please.

THE COURT: There is no question eventually he heard of it, is there?

MR. DEVINE: No.

THE COURT: Let's go on to something that is in contest.

Q When did you first hear of a proposed merger between Atron and MDS-Atron?

A I didn't hear about it. I read about it in February, 1971, in the Wall Street Journal.

Q In the weeks immediately following your learning of this proposed merger, were you in favor of it or against it as a shareholder?

A I had no opinion until I asked my analyst at Merkin & Co. to give me a report on Mohawk.

Q Did you obtain such a report?

A Yes, I did.

Q Approximately when?

A I think that the report was dated February 6, 1971, something like that.

Q After you obtained that report, did you then have an opinion favorable or unfavorable as to the proposed merger?

A Well, I had very mixed reactions. First, the report I had asked the analyst at Merkin & Co. to give me was a negative report on Mohawk and obviously inasmuch as the merger proposal called for us to approve a merger of Atron into Mohawk and Mohawk was a very -- Atron was a small company,

we were basically asked to convert our investment into another company. So that there was no longer an investment in Atron. So I had to look at the long-term prospects for an investment in Mohawk. The report was negative and, therefore, from that point of view I was against the merger.

Second, taking into account the posture of Mohawk in the market place, I mean the market place from the point of view of distribution, manufacture and generation of equipment in that industry, Mohawk was not a very good investment.

So from that point of view I was against the merger.

On the other hand, my business consists of seeing that the private investments that we made at some point or another are turned into a more liquid form of investment. So from that point of view I was somewhat interested.

Another reason why I was against it -- or my reaction was against the merger at the outset was that I felt that the ratio of exchange between Atron and Mohawk was much too much in favor of Mohawk.

Q I have put in front of you Plaintiff's Exhibit 27. Is that report which is annexed to the covering letter as part of that exhibit the report which you have been testifying about?

A That's correct. I guess I got my dates a little bit mixed up there. The report is dated February 3, 1971.

Q To whom did you send that cover letter and a copy of the report?

A I sent the covering letter and report to all the people that had participated in the first and second private placements, and also to those people who had purchased some shares from the first group. Excluding from the mailing, I think, the people that were really associated with Atron and Mohawk, because I assumed that they had made -- I mean they knew more about the circumstances of Mohawk and Atron than I did or that my analyst did.

Q In the period from 1969 through April 30, 1971, did you have occasion to speak with Mr. LePow on investment matters?

A Many times.

Q And with Mr. Ludt?

A Many times.

Q And Mr. French?

A Many times.

Q Did these coverings include discussions of the proposed merger between Atron and MDS-Atron?

A Yes, it did.

Q Subsequent to February 5, 1971, was your attitude regarding the proposed merger modified in any way?

A Well, I think that it was modified to a certain

extent. As I said, at the beginning I was more looking at the merger from the point of view of long-term investors. And as time went by I became more interested from the point of view of those investors that were included in the first and second private placements from the short-term aspects, and felt that under market conditions, economic conditions that prevailed at the time, that the proposed merger provided them a way to convert their shares of Atron, which were restricted, into free shares of Mohawk which they could sell upon the effective date of the merger. And I felt that since I had put them on notice that our views or my views with regard to Mohawk were rather negative, it would be up to them at that point to make a decision as to whether they want to remain long-term investors or not. But at least they would be provided with a way of liquifying their investments.

MR. UNGER: I would move to strike most of that testimony, your Honor, on the grounds that I don't think it was responsive to the question.

THE COURT: Well, is there any question that he could have elicited it from the witness if he framed a different question? Because if I grant your motion we will get five more questions and the answer will come out.

This is your subjective thinking that you have testified about?

THE WITNESS: Yes.

THE COURT: All right, let us go on.

Q I show you Plaintiff's Exhibit 18, which is a copy of the Atron proxy statement. Did there come a time when you received a copy of that proxy statement?

A That's correct.

Q Do you recall when you received it?

A I don't recall exactly the date upon which I received it. I know that as of the day I had my telephone conversation with Mr. Stoutenburgh on April 19, 1971, I was not in possession of the proxy statement. And as a matter of fact, on that same day of April 19, 1971, I sent out another communication to the participants in the private placements and I remember very well that I dictated that communication without having the proxy material in my possession at that time.

MR. DEVINE: Your Honor, that communication that the witness is referring to seems to be out of order in the exhibits. I will find it and at that appropriate time and --

THE COURT: It is already in evidence. You can come back to it.

Is it already in evidence?

MR. DEVINE: Yes, it is, your Honor.

Q Do you have any doubt that shortly after April 19th

you did receive a copy of the proxy statement?

A I have no doubt about it.

Q After you received it, did you read it?

A Quite carefully, yes.

Q As you read it, did the proxy statement say anything specific as to whether holders of Atron restricted stock would receive freely transferable Mohawk stock if the merger was approved?

MR. UNGER: Objection, your Honor. The document speaks for itself.

THE COURT: Yes, sustained. The document speaks for itself. He may be asked whether he looked for anything on that subject.

Q Did anything in the proxy statement --

A I looked for something on that subject but I couldn't find anything specific.

Q Did anything in the proxy statement confirm your understanding that the Mohawk stock would be freely transferable?

A Certainly did.

Q And would you tell the Court as briefly as possible what portions of the proxy statement confirmed that understanding?

A Well, if you look at page five, it tells you first that the conversion of Atron shares into Mohawk shares will

occur automatically and without any further action on the part of Atron shareholders. It's an automatic conversion.

The second point, it says that the merger will be terminated or abandoned in the event, and the second event is that the Mohawk common stock to be issued in connection with the transactions contemplated by the agreement of merger is not listed on the New York Stock Exchange.

Now, per se when you say that the stock is listed on the New York Stock Exchange, it is a freely marketable security. It is freely marketable unless the holder of that security has agreed in writing that it is not freely transferable. And Mohawk and Atron must have known that because they made the requirement of certain holders of Atron stock that their stock would not be freely transferable. And you can see that at page five under item number three, Mohawk doesn't have to go through with the merger in the event it doesn't receive shares from -- to be received by such persons in connection with the merger.

So when you put all this together it assumes that all of the shares that you are going to receive are going to be freely marketable and tradable on the New York Stock Exchange.

Q You referred in your testimony to a letter which you wrote dated April 19, 1971. Did you write that letter

after you had a discussion with Mr. Stoutenburgh?

A I did. That is the only thing that triggered my writing the letter.

Q Before we come to April 19th, in the period from January 29, 1971, when the proposed merger was announced, through April 30t 1971, can you recall on how many occasions you spoke with Mr. Stoutenburgh about the proposed merger?

A This is from the date that the merger was announced to April 9th?

Q April 30th.

A The conversations that I will recall specifically is that immediately after the merger was announced I refrained from calling Mr. Stoutenburgh until I had some idea as to what my analyst's at Merkin & Co. reaction with regard to Mohawk would be. So I must have called him -- as a matter of fact I remember that I sent the communication to the participants in the private placement first, without talking t Mr. Stoutenburgh. So it must have been around the end of the first week in February that I called Mr. Stoutenburgh, inasmuch as I was deeply involved in Atron and its finding in its early days --

THE COURT: You see he only asked you how many times you spoke to Mr. Stoutenburgh.

THE WITNESS: I am trying at the same time to recall approximately when --

THE COURT: What is the answer, you spoke to him twice, three times, four times, how many times?

THE WITNESS: That conversation, I saw Mr. Stoutenburgh in the office a few times.

THE COURT: Please, Mr. Le Landais. Your own attorney has asked you how many times you spoke to him between the date the merger was announced, the proposed merger, and April 30th. And there is an answer for that. The answer is a number. Twice, three times?

THE WITNESS: I have to guess, your Honor.

THE COURT: Don't guess. Let's go on to another question.

THE WITNESS: I'd say about five times maybe.

Q You have described already a phone conversation early in February. Did there come a time when you had a meeting with Mr. Stoutenburgh in that same time period?

A Well, he came to the office at Merkin & Co. where John Halsey was employed a few times, and I saw him there on a very casual basis. We discussed the merger briefly, but we didn't have any formal meetings.

Q In either of the two conversations you have mentioned in early February of 1971, did you discuss with Mr. Stoutenburgh

whether holders of Atron restricted stock would receive freely transferable Mohawk stock if the merger was approved?

A At the beginning, as I said --

THE COURT: Yes or no, did you? We have to get along here, gentlemen. He has asked you a question that calls for a yes or no answer.

THE WITNESS: At his first telephone conversation I don't think I brought up the subject.

Q When you met Mr. Stoutenburgh in the offices of Merkin & Co., did the subject come up?

A It did.

Q And what was said?

A That the holders of Atron stock would receive free stock of Mohawk.

Q What was Mr. Stoutenburgh's position with Atron at that time?

A He was president of the company and a director.

Q Moving now to April 19th, we have had some preliminary testimony about a conversation with Mr. Stoutenburgh on that day. Will you please tell the Court what you recall having been said in that conversation and by whom it was said.

A Mr. Stoutenburgh said, "Pierre, I would like you to do me a favor."

I said, "What can I do?"

He said Ladenberg-Thalman was against the merger and he was afraid that unless he received enough proxies, the merger would not go through. And he said, "If you really want your participants in your private placements to receive their free stock, you had better canvas them and get them to send their proxies in voting in favor of the merger."

Q Was anything more said to the best of your recollection?

A I mean that's what I recollect of the conversation.

Q After April 19, 1971, but before April 30, 1971, did you have any discussions with either Mr. LePow, Mr. Ludt or Mr. French which related to the proposed merger in any way?

A Yes.

Q Did you speak with all of those gentlemen at different times?

A Yes.

Q And did you relate to all of those gentlemen the substance of your conversation with Mr. Stoutenburgh?

A Yes.

Q Very briefly, who is John Halsey? You have mentioned him once or twice in your testimony.

A John Halsey used to work for me.

Q Was he employed by Merkin & Co. in the period from January, 1971, through April of 1971?

A I believe so. He was on January 29th, but I am not too sure that he was still on April 30th. I know that he left Merkin & Co. at some point. I don't know the exact date.

Q During his employment at Merkin & Co., were you his superior?

A Yes.

Q Did he report to you?

A Yes.

Q In the January to April, 1971, period, did you know Mr. Halsey's relationship with Mr. Stoutenburgh?

A I knew that he was his brother-in-law.

Q In the January to April, '71, period, did you discuss with Mr.Halsey the proposed merger of Atron and MDS-Atron?

A Many times.

Q Did you discuss with him whether holders of restricted Atron stock would receive freely transferable Mohawk stock?

A Yes.

MR. UNGER: Objection. He is leading the witness.

THE COURT: He is leading the witness, but you see if it is not in issue let's go ahead with it.

MR. UNGER: I think some of this is in issue.

THE COURT: How is it binding on the defendants if he talked to Halsey?

MR. DEVINE: He was a paid solicitor for Atron.

THE COURT: Was he?

MR. UNGER: He was, your Honor.

THE COURT: During that period?

MR. UNGER: During the period after April 16th.

THE COURT: It is leading but I will let it be answered. Let's try and make the questions concise and simple so they can call for simple answers.

Q Did you discuss that subject with Mr. Halsey?

A About what, he being the proxy solicitor?

Q Did you discuss with him at all what kind of stock would be received by holders of Atron restricted stock?

A Many times.

Q What was said, give us the substance as briefly as possible of what was said in those conversations.

A John Halsey had personally a fairly large investment in Atron stock. I believe at the time that he purchased it he went into personal debt to do so.

Q Don't give any background. Just tell us what was said, if you can recall, rather than give background information.

A He wanted that stock to be free for himself and for everybody else also.

THE COURT: Just tell us what he told you.

THE WITNESS: He told me that the stock would be free.

Q In the period from January, 1971, through April 30, 1971, did you have any knowledge that Mr. Halsey was a paid proxy solicitor for Atron?

A None whatsoever.

Q At any time during that period on behalf of Merkin & Co. did you give him permission to solicit proxies for Atron?

A I certainly did not.

MR. UNGER: Objection, your Honor. There is no testimony he was employed during the period when the proxy solicitation material went out.

THE WITNESS: He was employed.

THE COURT: Wait just a moment.

MR. UNGER: He was employed by Merkin during that particular period.

MR. DEVINE: I withdraw the question.

THE COURT: I am afraid I don't understand the purpose of the question.

THE WITNESS: It is a violation --

THE COURT: You keep quiet. You are a witness here. You keep quiet unless you are directly addressed by the Court or the attorneys.

MR. UNGER: The question assumes that Mr. Halsey was employed by Merkin in the period after the proxy solicitation went out.

THE COURT: Well, Merkin is not a plaintiff here, is it? How is this relevant?

MR. DEVINE: I withdraw the question.

THE COURT: It is withdrawn. Let's go on to something else.

Q On April 30th of 1971, did you believe that Le Landais & Co. was going to receive unrestricted Mohawk stock as a result of the proposed merger?

A I did.

Q When did you first learn that the Mohawk stock to be received by Le Landais and Co. as a result of the merger would be restricted?

A Must have been around the 15th of May, 1971.

Q And how did that come to your attention briefly?

A Briefly, the transfer agent which was appointed for the exchange of shares wasn't doing anything in transferring the shares, and my back officers reported to me they hadn't received any instructions from Mohawk with regard to the

transfer of the legend shares of Atron.

Q How was it that your back office had transmitted shares to Mohawk's transfer agent for transfer?

A First I wanted to transfer the shares that were owned by Pierre J. Le Landais & Co., Inc., and also Mr. John French of Research and Sciences Investors had told me that he wanted to sell some shares and I think he had already given me some orders to sell shares of Mohawk that he was going to get upon the conversion of these Atron shares into Mohawk shares.

Q And the back office of Merkin & Co. had put the certificates of Research and Sciences Investors in for transfer. Is that correct?

A Mechanically I don't know whether it was handled that Research and Sciences sent the certificates to the transfer agent with instructions to send them to us, or whether Research and Sciences sent the certificates to us for transfer. But I know that we failed on certain trades that we did for Research and Sciences because we couldn't produce the certificates.

Q Was the Mohawk stock which Le Landais & Co. eventually received restricted?

A It was.

Q Was it legended?

A It was.

Q Did there come a time when the sale of the Mohawk stock received by Le Landais and Co. in the merger was registered by Mohawk?

A Yes, it was.

Q And when did that occur?

A I believe it was the latter part of August, 1971.

Q Did Le Landais & Co. sell its Mohawk stock pursuant to that registration statement?

A First day it could, yes.

Q Prior to the merger when you read the proxy statement, did you read the Mohawk financial statements?

A I certainly did.

Q Included in that proxy statement?

A Yes.

Q Did you consider the financial information regarding Mohawk important in considering your vote on the merger?

A Very important.

Q Will you state briefly for the Court why you considered that financial information to be important?

A Well, I considered it very important because when you are in the business of trying to value marketable securities, you look at the company's operations and results

from operations, and in most cases the stock is valued according to the progression of the business and the profitability of the business. And Mohawk showed a certain trend in both revenues and earnings which was impressive and which, therefore, could support a fairly high price earning ratio.

Q On April 30, 1971, did you know that Mohawk subsequently would restate downward its 1970 sales and income figures?

A I did not.

Q On April 30, '71, did you know that on Tuesday of the following week Mohawk would announce changes in accounting practices?

MR. UNGER: Objection, your Honor. There is no testimony that Mohawk announced changes in its accounting practices.

THE COURT: I thought they did. I thought they had a conference at King of Prussia and they announced they were going to do some things.

MR. UNGER: Considering doing things.

THF COURT: And they ultimately did them, didn't they?

MR. UNGER: They did them in the end of June, 1970, and announced them in July.

THE COURT: I think that is debatable.

MR. UNGER: The question assumes a fact.

THE COURT: Perhaps you ought to rephrase the question.

Q Did you know about any consideration on Mohawk's behalf of accounting changes?

A I certainly did not.

Q If you had known on April 30, 1971, of consideration on Mohawk's behalf of accounting changes, would that have affected your consideration of the merger?

A It certainly would have.

Q If you had known on April 30, 1971, that Mohawk had decided to change its fiscal year, if you had known only that much, would that have had any affect on your consideration of the merger?

A It would have, yes.

Q In what way?

A Because when a company the size of Mohawk, in general a company changes its fiscal year it is for very good reasons and you want to know what those reasons are before you take any action as important as voting on a merger proposal.

MR. DEVINE: No further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. UNGER:

Q Did you testify as a deposition in this action?

THE COURT: He did. Let's go on.

Q Any particular reason why you didn't sign your deposition?

THE COURT: I will deem it signed. Let's go on. Ask him does he recall being asked this question and giving this answer and state the line and page number.

Q I show you Defendants' Exhibit H for identification --

THE COURT: Excuse me. You are not precluded from using the deposition.

MR. UNGER: I will, your Honor.

THE COURT: All right.

Q I ask you if you have seen that document before.

A Yes.

Q What is that document?

A It was prepared by my office and it is a list of all of the investors in Atron first and second placement, including certain people who purchased stock from the first group, from the first two groups.

Q And is that the list that you used when you mailed out your letter or the material on February 5th on

* * *

MR. UNGER: That is what I am going to look for.

THE COURT: Mr. Unger, if there is a specific page in there that this witness has signed or that he is shown as marked present, please call it to his attention because he is looking through it and it's taking time.

MR. UNGER: I will have to go through it with the index.

THE WITNESS: I think there is only one meeting --

Q Let's go through this.

THE COURT: You will have to do that during recess. If you have a minute book, offer it in evidence. Do you have a corporate minute book of this company?

MR. UNGER: I have a director's copy of a corporate minute book.

THE COURT: Offer it in evidence.

MR. UNGER: I will offer it in evidence.

MR. DEVINE: No objection.

(Defendants' Exhibit AB received in evidence.)

Q Now, Mr. Le Landais, when did you first hear of the agreement in principle to merge between Mohawk or a Mohawk subsidiary and Atron?

A February 1, 1971.

Q Now, what was the first time with reference to that date that Mr. Stoutenburgh told you that the private placement

shareholders of Atron would be getting Mohawk shares that were free of the restrictions on those shares?

A I believe it must have been in February of 1971 sometime.

Q I am going to read you a series of questions and answers and I am going to ask you whether you were asked that particular question and whether you gave that answer.

To save time, I would say these refer not to a particular period of time, as far as I can tell, starting at page 95 in the questions.

Were you asked this question and did you give the following answer:

"Did you at any time tell Mr. LePow that he would get free stock or his company would get free stock in the merger?

"A I don't recall at that time. I recall subsequently that we were all expecting free stock when it started to bounce back from the transfer agent."

Was that question asked of you and did you give that answer at your deposition on June 12, 1973?

A If you are reading my deposition, I guess this is the answer that I gave.

Q "Q How about Mr. Ludt, you told him he would get free stock and, therefore, they should all be in favor

of the merger?

"A I don't recall conversations of this nature. I recall the conversations we had in general terms after, that we thought we all thought we were going to get free stock."

Was that question asked of you and did you give that answer?

A Well, after which date?

THE COURT: Read him the question and answer again.

The question is: did you recall making this answer on your deposition?

THE WITNESS: Yes.

MR. UNGER: Would you like me to read it again?

THE COURT: He says he does recall.

THE WITNESS: Yes, approximately, yes.

Q "After April 30th you were talking about conversations after April 30th?

"A No, before.

"MR. DEVINE: After April 30th?

"THE WITNESS: Yes, we were always under the assumption we were going to get free stock. There was no doubt in my mind that we were going to get free stock."

Were those two questions put to you and did you give those answers?

A Yes.

Q "Mr. French, also?

"A Yes."

Did you give that answer?

A Yes.

Q "Q He was going to get free stock?

"A Yes.

"Q What gave rise to this assumption, Mr. Stoutenburgh?

"A Well, the assumption was based on the fact that there was never any differences in the shares that the stockholders of Atron were going to get, and also usually in a merger proposal when one class of stockholder is going to be treated different from the other, it is explicitly explained, and their approval, if they are going to receive securities which are restricted, the approval for the registration has to be specifically mentioned."

Was that asked of you?

A I guess.

Q And you gave that answer?

A I guess so.

Q What kind of stock did you and Pierre Le Landais & Co. have in Atron at that time?

A At which time?

Q Before the merger. You had common stock?

A Common stock, yes.

Q Did Atron have any other kind of stock out than common stock at that time, in April of 1971?

A I don't believe so. There were some warrants and options outstanding, I think. No other securities.

Q "Q So the basis of your assumption was the fact that Mohawk said you were going to have one share of Mohawk for every four shares of Atron?

"A Yes."

Was that question asked and did you give that answer in the deposition?

A I assume so.

Q "Q That was the basis of your assumption, none of the material or anything anybody may have said to differentiate to you as a holder of Atron stock --

"A No. I think there was one class of stockholder who was not treated simply as other stockholders. There was one class of stockholders who was not treated like the other stockholders. When the stockholders were also management of Atron, and I believe as far as they were concerned the proxy material did say they had agreed to certain restrictions."

Did you give that answer to that question?

A That's correct.

Q Now, let me show you number five on that page or number three on page five at the bottom of that page --

THE COURT: That is Exhibit 18?

MR. UNGER: Plaintiff's Exhibit 18, your Honor.

Q I ask you doesn't that number refer to the controlling stockholders of Atron?

A There were no controlling stockholders.

Q Does that refer to the controlling persons of Atron?

A I don't know.

Q The insiders?

A I don't know. It says from certain shareholders.

Q Now, I am going to ask you -- incidentally, Mr. Le Landais, were you a direct stockholder of Atron by April 30, 1971?

A No.

Q When did you cease to have a stockholder, yourself personally, having an interest in Atron?

A I believe I sold the stock that I owned personally to my company in April of 1971.

Q I show you Defendants' Exhibit N in evidence and ask you if that reflects the transaction whereby you divested yourself personally of the Atron shares.

A It does.

Q Did you advise Atron of that fact?

A No, I did not.

Q Did you advise Mohawk of that fact?

A No reason to.

THE COURT: Just answer yes or no. Don't argue.

THE WITNESS: I am sorry. No, I didn't.

Q And didn't you tell Mohawk, in fact, that you still owned those shares in connection with the registration of those shares in August of 1971?

A From a record point of view, yes.

Q At the time that you sold those shares to Pierre J. Le Landais and Co., did you receive an investment letter from that company?

A It is like switching --

THE COURT: Can't you answer him yes or no, you received a letter or you didn't. Let's get along.

A I didn't.

Q Now Mr. Le Landais, by February 5, 1971, had you formed any opinion as to whether or not the Atron private placement holders would get shares that were free of restrictions, Mohawk shares free of restrictions?

A I think I assumed in my mind that they would, yes. But this was not an important factor at that point.

Q Now, how about by April 19, 1971, was it an important factor at that time?

A Yes.

Q Well, can you explain to me, and I will show you Plaintiff's Exhibit 28 in evidence, why you didn't tell the private placement holders who you sent that letter to that they were going to be getting Mohawk stock that was free of transfer restrictions and that was the reason, a good reason to vote for the merger?

MR. DEVINE: Objection, your Honor. I think he testified as to conversations with those people. I don't think there is any basis for the assumption that he did not tell them.

MR. UNGER: He also testified that he sent that letter out to others on that list.

(Pause)

THE COURT: Objection overruled.

MR. UNGER: Can you read the question back?

(Record read)

A I didn't think there was a need for it. The proxy material spoke for itself. As far as I was concerned, it was just a question of making these people act on the proxy material.

Q The merger was going to go through no matter what

anybody said. Isn't that a fact?

A That's not what Stoutenburgh told me on the telephone.

Q Now, with respect to that telephone call you talked about on April 19, 1971, Mr. Stoutenburgh called you?

A I don't know who called whom.

Q Well, let me read you this question and this answer, and I ask if that question was given to you and whether you gave this answer:

"Q Do you have any other record which would reflect," and that is referring to Plaintiff's 29, which I think is now in evidence, "Do you have any other record which would reflect in any way that conversation with Mr. Stoutenburgh on the 19th, either the fact of the conversation or the substance of it?

"A No. I remember very well the call because I was surprised to get a call from Joe Stoutenburgh, in view of the fact that I didn't expect him to call me and I certainly didn't expect him to call me to do him a favor."

Was that question asked of you and did you give that answer?

A That's right.

Q Are you telling me you don't remember since that time whether or not Mr. Stoutenburgh called you or you called him?

A When I answered your question, I answered directly.

Obviously the first call must have come from Mr. Stoutenburgh

Q I'm asking you if you are telling me something different now.

A When I talked to him I don't know whether it was the call he initiated or whether it was my secretary that returned the call to him. But obviously the first call came from Mr. Stoutenburgh, if there were two calls.

Q Now, let me ask you whether you were asked this question and you gave this answer:

"Q When you sent that note out," referring to Plaintiff's Exhibit 28 in evidence, "were you doing him a favor or were you doing your investors a favor or both?"

This is on pages 92 and 93 of the transcript.

"A I think I was. What really motivated me in sending the note to the stockholders was that I wanted to provide for them, I wanted to make sure I could do everything possible to provide a way out for them for their investment."

A Correct.

Q Was that question asked and did you give that answer?

A I did.

Q Now, let me ask you whether you were asked this question and whether you gave this answer with reference to that telephone conversation.

"Q Mr. Stoutenburgh said to you that the private investors would be able to sell after the merger?

"A I don't think he put it that way.

"Q How did he put it?

"A As I said, I told him I was in favor of a merger only for one reason, and that is to provide a way for my stockholders to get out. And he said, 'Well, if we don't get the votes from your stockholders they won't be able to get out.'"

Were you asked that question and did you give that answer?

A Yes, if you are reading that correctly.

THE COURT: Did you believe that at that time that if they didn't vote affirmatively they would be able to get out?

THE WITNESS: That's what Mr. Stoutenburgh told me.

THE COURT: What did you say?

THE WITNESS: I reflected upon it for a little while and I told him I would canvas the holders of the private placements.

Q Did you ask Mr. Stoutenburgh what do you mean by "get out"?

A No.

Q You assumed what that language meant?

A As I said at the time I don't recollect the exact words but there was nothing to the contrary that it meant what we were talking about all the time, which was to get free tradeable stock.

Q Now, Mr. Le Landais, how many shares in the private placement, and I will ask you to give me the after-the-reverse split numbers, if you can, were you responsible for selling to your own customers, people you knew or for placing?

A Well, my own customers, I don't know. I acted for the firms in each case.

Q I am going to show you lists of stockholders in the first and second private placements that are contained in the pretrial order in this matter as fact, as stipulated fact. I am going to ask you to tell me, and these are after-split numbers. I am going to ask you to go down that list and tell me who were your customers, who did you personally place certain shares of stock with? Start with the first placement.

THE COURT: What page are you on?

MR. UNGER: This is on page seven.

THE COURT: Are you distinguishing between this witness and the firms that employed him at the time?

MR. UNGER: Yes, your Honor. Of course, within the

* * *

Q How about Gerald Roenors, had you met him?

A I don't believe so.

THE COURT: How is this significant?

MR. UNGER: Mr. Le Landais testified he sent this letter to all these people.

THE COURT: Merkin sent the letter.

MR. UNGER: Who had no relation to any of these particular placements.

THE COURT: As I understand it, the company with which he was employed was directly associated with these placements.

MR. UNGER: Prior to that time, other companies.

THE COURT: Yes. He has told you which ones he knew. I will infer he didn't know the rest.

Q Now, let me ask you whether you were asked this question and whether you gave this answer on your deposition.

"Q When you received the call in April from Mr. Stoutenburgh, had you previously received the proxy statement?

"A I have the impression it was just about the same day."

Were you asked that question and did you give that answer?

A Yes.

Q Now, what since the time of this deposition, which is June 12, 1973, caused you to say that you hadn't received the proxy material until after that particular day?

A The only thing that I recollect is when I dictated the note that I sent out to the participants in the private placements, I had not seen the proxy material as then.

Q And you recollected that after your deposition?

A I don't recollect whether the proxy material came in that afternoon, that day or the next day, but it came in just about the same time.

Q Now, in the April conversation, your April 19th conversation with Mr. Stoutenburgh, was the name Ladenburgh-Thalman mentioned?

A By Mr. Stoutenburgh, yes.

Q What did he say?

A That Ladenburg-Thalman was not in favor of the merger and he was afraid that they were going to vote against it.

Q Did you have any contact with Ladenberg-Thalman with respect to Atron prior to that conversation with Mr. Stoutenburgh and subsequent to your discussions with respect to the public offer?

A Well, subsequent to the public offering I did. I would say within the next month or two months afterwards.

Q But not with respect to the proposed merger between Atron and MDS-Atron?

A Not with respect to the proposed merger, no.

Q Were you aware by April 19, 1971, of any opposition, any active opposition to the merger, the proposed merger between Atron and MDS-Atron?

A Other than my conversation with Mr. Stoutenburgh, no. Except I think Mr. Halsey mentioned it to me also.

Q When was that?

A I think it was after I talked to Mr. Stoutenburgh.

Q Isn't it a fact that Mr. Halsey left Merkin the end of March of 1971?

A I don't recall when he left Merkin and Co.

Q When you had this conversation with Mr. Halsey, was it while he was at Merkin?

A I don't recall.

Q Had you ever commented to Mr. Stoutenburgh with respect to the merger ratio, the four for one ratio that had been announced?

A I think I did.

Q What did you tell him?

A I told him that I wasn't very happy with it.

Q And about when was that conversation?

A I believe it was in my telephone conversation that I

had with him in the early part of February and I think on a few occasions when he visted John Halsey at Merkin and Co.

Q Now, by April 19th, isn't it a fact that the Mohawk stock had risen by eleven or twelve points from January 29th, from its price on January 29, 1971?

A I believe it had.

Q The Atron stock hadn't risen to that extent, had it?

A I think it had risen about the same amount, but I'm not too sure.

Q Do you know why or do you have any reason for or that would account for the rise in the Atron stock during that period?

A Except that I would assume that there would be some arbitration between the two securities, or that investors wanted to buy Atron stock. I don't know.

Q The Atron stock would follow the Mohawk stock sometime after the merger announcement. Isn't that true?

A It would depend on what people thought the prospects for the two companies would be or what sort of chances there would be that the merger would go through. I think that if there is a gap between the parity, then it would imply that people didn't think that the merger was going to go through.

I don't know. I didn't follow the prices of both stocks on a daily basis.

Q Well, in light of the fact the Mohawk stock had risen some eleven or twelve points by April 19th, had your problems with respect or did you still have problems with respect to the merger ratio?

A Certainly. The action of prices on the market do not in any way affect ratios.

Q The Atron stockholders weren't going to get something better than they originally were to get on the announcement on January 29th?

A I mean you are asking me to give an opinion as to whether Mohawk stock went up because they were acquiring Atron or --

THE COURT: He is asking you whether the increase in price in the Mohawk made the ratio less unacceptable to you.

THE WITNESS: Your Honor, I don't think it made any difference as far as I was concerned.

THE COURT: All right.

Q Mr. Le Landais, had you been receiving as a stockholder of Atron or had your company been receiving as a stockholder of Atron the various annual reports and any quarterly reports that Atron had been publishing?

A Yes.

Q I show you Defendants' Exhibit O for identification and ask you if you received that report from Atron.

A Yes.

MR. UNGER: I ask that be marked in evidence, your Honor.

MR. DEVINE: No objection, your Honor.

THE COURT: Received in evidence.

(Defendants' Exhibit O received in evidence.)

xxx

Q Atron had had approximately a million eighty thousand loss for its fiscal year ending September 30th, hadn't it, Mr. Le Landais?

A That's what it showed, I believe.

Q You were pretty familiar with Atron's business, weren't you, as a former director of Atron?

A Yes, you might say.

Q Did you have any familiarity with computer stocks in general, computer peripheral companies?

A To a limited degree, yes.

Q And in the period of January through April, 1971, do you know whether or not those companies were having problems selling their equipment?

THE COURT: Those companies being whom?

MR.UNGER: The computer peripheral companies in

general.

A Some had problems and some didn't.

Q Was there a general recession in that period of time?

A Recession is a qualitative term. I think there was a down trend in general, but some of the companies did better.

Q When you got the proxy statement which is Plaintiff's Exhibit 18, did you read it through?

A Yes, I did.

Q And in reading that did you learn that Mohawk could begin to manufacture the Atron data processor on its own if it so chose?

A I knew that, yes.

Q And it is a fact, isn't it, that Mohawk accounted for approximately 90 percent of Atron's revenues during the period Atron was in existence?

A That's what the annual report says, yes.

Q Now, when you sent the letter of February 5, 1971, at that time did you attempt to sell your Atron stock or the Atron stock held by Pierre J. Le Landais & Co.?

A I couldn't sell the Atron stock. I could not sell the Atron stock.

THE COURT: He is asking you if you made an attempt.

Did you attempt to sell it?

THE WITNESS: No.

THE COURT: Answer him yes or no.

Q Did you seek an opinion of counsel as to whether or not you could sell that stock?

A I am sorry, are you talking about the Mohawk stock I received?

Q The Atron stock. In February of 1971, did you seek an opinion of counsel as to whether or not you could sell that stock?

A In February of '71?

Q Yes, when you sent out that February 5, 1971, report that is marked in evidence, Plaintiff's Exhibit 27.

A No, I did not seek out an opinion of counsel as to whether I could sell my Atron stock, no.

Q Or whether Pierre J. Le Landais and Co., could sell it?

A No, I did not.

Q Now, your letter of April 29, 1971, Plaintiff's Exhibit 28, I believe, did you send a copy of that to Mr. Stoutenburgh?

A Which letter is that?

A Here it is, Plaintiff's Exhibit 28.

(Handing)

A I don't know whether I did or not.

Q Now, if the merger had not gone through, you would have still been left or Pierre J. Le Landais and Co. at that time would have been left with the Atron stock bearing restrictions on transfer. Is that correct?

A That's correct.

THE COURT: Suppose you had known in April that you were going to receive restricted certificates of Mohawk in exchange for your certificates of Atron, what would you have done?

THE WITNESS: I would have been against the merger.

THE COURT: All right.

Q You would have preferred to continue to hold your Atron or the Atron's shares that you still had?

A That's correct.

Q The fact in the proxy statement that Mohawk could begin to manufacture that machine itself, knowing that fact, did that have any effect upon your decision as to whether or not to vote for the merger?

A No.

Q Now, I think you testified that you at Merkin sold some Mohawk shares for Research and Sciences Investors in May of 1971. Isn't that so?

A That's correct.

Q You were the broker on the transaction?

A Merkin & Co.

Q You were the registered representative on that transaction?

A I did not act as a registered representative. I was the managing partner of the firm.

Q Did the transaction come into Merkin through you?

A It did, yes.

Q Did you at the same time sell the shares of Mohawk that you were going to receive when they came through?

A No. You mean that my company was going to receive? No.

Q But you wanted to get out of Mohawk?

A That's correct.

Q Were you aware in April of 1971 which company, MDS-Atron, MDS or Atron had to determine whether or not the shares of Mohawk stock to be given to the Atron private placement holders, should the merger become effective, whether or not the Mohawk shares would be similar or bear similar restrictions on transfer?

A I don't understand the question.

Q In April of 1971, did you know which of the companies, Mohawk, MDS-Atron, or Atron, had to determine whether the Atron private placement holders were going to get

Atron stock or Mohawk stock free of restrictions or Mohawk stock with restrictions similar to those on the Atron stock they then held?

A No. But the proxy material --

Q I didn't ask you about the proxy material. Mohawk had to make that determination, didn't it? It was Mohawk shares?

A I don't know.

Q Was Atron going to make the determination with respect to Mohawk shares?

THE COURT: The witness has said he doesn't know. Let's go on to something else.

How much more cross examination do you have for this witness?

MR. UNGER: Not too much more, your Honor.

THE COURT: Let's proceed along.

Q When you sent out that April 19, 1971, letter, Plaintiff's Exhibit 28, you did that on your own, didn't you?

A Because Mr. Stoutenburgh had asked me to do it.

Q He asked you to send a letter out to all the shareholders?

A To the people that participated in the private placements.

Q Did he pay you for it?

A No.

Q Did he cover at least your postage?

A No.

Q You had met Mr. Wells, hadn't you, sometime before?

A Before what?

Q Before April of 1971.

A Yes, I met Mr. Wells in January of 1969.

Q And had you had other contacts with him subsequent to that time?

A I saw him, I think, a couple of times at the Mohawk offices. We had dinner one night together.

Q With respect to Atron and with respect to other matters?

A I would say mostly with respect to Atron. I think that Wells and I at one of these meetings discussed the possibility of me, or Stralem and Company at that time, helping Mohawk raise some money in Europe. I would say that this didn't amount to anything.

Q Did you know Mr. Rifenburg back in approximately February of 1970? You had met him then?

A In February of 1970?

Q Yes.

A Yes, I met Mr. Rifenburg at the same time I met Mr.

Wells.

Q Let's go back a little bit. How about February of 1969?

A Yes, I believe that this meeting with Mohawk took place in January of 1969, and with Mohawk, Mohawk being represented by Mr. Rifenburg and Mr. Wells.

Q Now, at the time you received the Atron proxy statement, were you aware that you had signed subscription agreements with Atron and had given them investment letters from the stock purchased from Atron, both you individually and Le Landais and Co., Inc.?

A Correct.

MR. UNGER: In the absence of Plaintiff's Exhibit 3, I think which we stipulated to --

THE COURT: It has been stipulated to already, hasn't it?

MR. DEVINE: Yes.

THE COURT: If he signed it, he has deemed to have known of it.

Q You have been in the stock brokerage business quite awhile, haven't you, Mr. Le Landais?

A Not in the brokerage business per se. Investment banking, yes.

THE COURT: Well, this Merkin was a stock broker,

wasn't it?

THE WITNESS: That's correct.

THE COURT: And you were the manager partner for Merkin for how long?

THE WITNESS: Approximately two years, your Honor.

Q What does the term "good delivery" mean?

A Good delivery means the delivery of certificates and customarily in negotiable form.

Q That is a term used on the New York Stock Exchange, isn't it?

A That's correct, and over-the-counter and on the American Stock Exchange.

Q Isn't it possible for registering shares listed on the New York Stock Exchange without regard to whether or not those shares are freely transferable under the Securities Act of 1933?

A I don't understand the question.

THE COURT: Well, you are asking for a legal opinion, aren't you?

MR. UNGER: I will do it another way.

THE COURT: Once a common stock is issued the company cannot issue any more of that class of stock unless they do register it, if some of it is registered on the New York Stock Exchange. Does anybody have any argument to that?

MR. UNGER: The witness testified to the contrary.

THE COURT: He said he didn't understand your question.

MR. UNGER: I mean on direct and that's why I was going into it.

(Pause)

THE COURT: Frame your next question, please.

Q Did you have any conversations with anybody at Mohawk prior to the effective date of the merger with respect to whether or not Mohawk would be issuing its stock on the merger to the Atron private placement holders without the restrictions on transfer?

A No.

MR. UNGER: No further questions of the witness at this time.

THE COURT: Any redirect?

MR. DEVINE: No questions, your Honor.

THE COURT: You may step down.

(Witness Excused)

MR. DEVINE: I call Joseph Stoutenburgh, your Honor.

J O S E P H S. S T O U T E N B U R G H, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

* * *

be a person of reasonable age.

THE COURT: All I asked was whether it was in Minnesota and you said it was.

Is that so, Mr. Stoutenburgh, this all took place in Minnesota, his handing you a copy of it?

THE WITNESS: Yes.

Q Is Mr. McCloud a person of reasonable age and discretion? Is he more than eighteen years of age?

A Yes. He is a vice president of MDS-Atron, Incorporated.

Q And he works in the same place that you worked in May or May and June of 1972?

A Yes.

Q What is your present employment?

A I am the president and director of MDS-Atron, Incorporated, a wholly owned subsidiary of Mohawk Data Sciences.

Q Did you begin that employment on or about April 30, 1971?

A Yes.

Q What employment did you have prior to that?

A Prior to that I was president and director of Atron Corporation.

Q When did you begin those two functions, and if their commencement dates are different you might distinguish between

* * *

them.

A Approximately December, 1968. The Atron Corporation was incorporated on November 27, 1968, and in its initial formulation, why when I joined it, then I became its president. Then in the formal formalizing its board, why I became a board member.

Q I show you Plaintiff's Exhibit 32, which I believe is in evidence at this point, and I ask if the signature which appears on the left margin of that exhibit is your signature.

A Yes, it is my signature.

Q Do you recall signing this document?

A No, I don't really recall it. It was part of, I assume, closing documents of which there were a multitude, a multitude of people. As a matter of fact, all the purchasers of the second private placement were there with attorneys and representatives or two, underwriting firms, ours, and the warrants had to be signed and paid for. I had a massive nosebleed and we were going through the signing business, and that was put before me probably and I obviously did sign it. I don't recall. It is my signature though, yes.

Q On January 29, 1971, did you meet with Mr. Wells and Mr. Rifenburg of Mohawk?

A January 29th?

Q 1971.

A Yes.

Q Where did that meeting take place?

A It took place in New York City at the financial offices of Mohawk Data Sciences.

Q Can you state briefly how that meeting came about?

A Atron Corporation was deeply involved in trying to negotiate additional work with Mohawk. We were buying equipment from Mohawk. We were fairly close to them in a business relationship since they had 90 percent of our sales at that time. And sometime within a month of that period why Mr. Rifenburg, I believe, requested that we come meet with him and look over some problems and the direction in the future that we were going.

Q Who represented Atron at that meeting?

A Mr. Mark Kornman, who was a vice president of systems and programming, and also, I believe, vice president of marketing at the same time. Mr. Dennis Stanga, who is vice president and treasurer. Also myself.

Q Who was at the meeting on behalf of Mohawk?

A Mr. Wells and Mr. Rifenburg.

Q Was anyone else present?

A Not initially, no.

Q Did someone join the meeting at a later point?

A Well, yes, at a later point after the main part of the meeting broke up, Mr. Wells did call in Mr. Hengen for purposes of formulating an announcement.

Q During that meeting did the subject of a merger between Atron and a subsidiary of Mohawk come up?

A During that meeting almost immediately Mr. Rifenburg said, "Let's talk first about the futures of the companies and the possibilities of the companies merging."

Q Did Mr. Rifenburg say any more than that on the subject of a possible merger?

A He asked me if I was prepared to discuss the subject.

Q Was this the first occasion on which the top officers of Atron had met with the top officers of Mohawk to discuss seriously a possible merger?

A It turned out to be the first time that a serious meeting took place, yes.

Q After you indicated to Mr. Rifenburg that you were prepared to discuss that subject, can you tell us very briefly what was said by whom?

THE COURT: Can I have a statement as to the relevance of this? As I understand, your clients were not present at this meeting. You are not bound by anything that took place there. Whatever happened there is all in Exhibit 18, isn't it?

MR. DEVINE: Yes.

THE COURT: What is it you are trying to show?

MR. DEVINE: I want to elicit the discussions which may or may not have occurred with respect to the freeing of Mohawk stock to be issued to Atron restricted holders.

THE COURT: Would it matter? Isn't all of that mentioned in Exhibit 18?

MR. DEVINE: It certainly is our position it is.

THE COURT: What possible significance has it? If he said they were all going to get free stock and it turned out later they didn't, I don't see the point.

MR. DEVINE: Mr. Wells said this was not discussed and I believe Mr. Stoutenburgh said earlier it was.

THE COURT: I will let you go directly from that point and stay away from these other details.

Q During the January 29, 1971, meeting, did anyone in any way address himself to the question of whether holders of restricted Atron stock would receive freely transferable Mohawk stock should a merger take place?

A I raised the question, and I am not sure whether Mr. Wells was there or not, but either he or Mr. Rifenburg, as to what was their attitude with regard to the first private and the founders' stock. I was interested in that attitude, since I held some of it and other people in the company held

some of it. Some of my family held some of it. He said that it was desirable and they would if they could in substance.

THE COURT: Would if they could what?

THE WITNESS: Would issue free stock if they could.

Q Who said that?

A Mr. Rifenburg. It was a matter of attitude which I felt was also healthy toward the company and the basis of our doing business and merging successfully and to its stockholders.

Q Did you consider the issuance to holders of Atron restricted stock, the issuance to them of freely transferable Mohawk stock to be a part of the merger arrangement?

MR. UNGER: There is a plan in agreement of merger --

THE COURT: I will permit him to answer that if he considered that an essential element of the agreement.

A Not really, no. The subject of restricted stock, my very limited knowledge of it, is that you can't sell it for distribution without certain conditions being met and these are legal matters.

Q Prior to January 29, 1971, did you consider whether the holders of restricted Atron stock had a contract right to have their stock registered in connection with any merger that might take place with Mohawk?

A I don't believe that the purchase agreements would make any such statement.

Q I am just asking if you considered that.

A No.

Q At the January 29th meeting, was the possibility of registering the Mohawk stock to be issued in connection with the merger, registering it under the 1933 Securities Act, was that discussed?

A No, sir, it wasn't. Not at that meeting.

Q Was it discussed?

A I don't recall it being discussed at all. Not in my discussions that I was involved in, Mr. Devine.

Q Following the January 29, 1971, meeting, did Ladenberg-Thalman express to you their reaction to the announcement of the proposed merger?

A Yes, sir. Ladenberg-Thalman did immediately following the announcement. They were very much disturbed with the ratio.

Q Did someone from Ladenberg-Thalman call you?

A Yes, they called us and we discussed the matter. My response was that I thought we had given due consideration to it and that I thought that it was in the best interests of the stockholders.

Q When did that phone call occur?

A That phone call occurred even before we left the New York offices, that afternoon, on the 29th.

Q Following the January 29th meeting, did you have any discussions with any officer or director of Mohawk as to whether holders of Atron restricted stock would receive freely transferable Mohawk stock?

MR. UNGER: Objection, your Honor. It is unlimited as to time.

THE COURT: I thought he said after January 29th.

MR. DEVINE: And before April 30th.

THE COURT: Before May 1st.

A No. I had no other occasion to really do that. They made an expression of attitude. It was simply a matter of legal determination from that point on.

Q Did you discuss that subject with the attorneys for Atron in the period from January 29, 1971, through April 30, 1971?

A I don't recall that I did, Mr. Devine. I may have talked to Mr. Flannery, who was counsel for Atron, but I don't recall whether I did or did not.

Q On April 30, 1971, did you believe that the holders of restricted Atron stock would receive freely transferable Mohawk stock if the merger was approved?

A Yes, I thought they would, with the exception of the officers, directors and promoters, so-called promoters, of Atron Corporation itself who had to acknowledge that they

may receive, may receive legended stock. So, therefore, we had other employees who were not promoters and so there was no reason for me at that point to believe that they would not.

Q Did there come a time when you were asked to sign a document of some kind stating that you understood that you would not receive freely transferable Mohawk stock after the merger?

A That's what I just referred to, yes, sir. That was part of the closing documents for the merger.

Q You signed such a document?

A Yes, I did.

THE COURT: On April 30th?

THE WITNESS: On April 30th, yes, sir.

Q Do you know who else was asked to sign such a document?

A Yes, sir. All the officers of Atron or beneficiaries, whether their wives or family, and those who were the original founders and deemed to be, therefore, the promoters.

Q At the time that you were asked to sign this document, did anyone explain to you the purpose of the document?

A They cited a rule of the Securities Law, and it was cited in the piece of paper, and it had to do with a matter of law which we agreed to. I don't know the details of that

law.

Q Well, do you have any present recollection of what was explained to you at that time as to the reason?

A No, I do not, Mr. Devine.

Q When did you first learn that the holders of restricted Atron stock would not receive freely transferable Mohawk stock?

A The time was just about the 10th of May and --

THE COURT: That's all he asked you, when.

THE WITNESS: Yes, sir, the 10th of May.

Q Following the January 29, 1971, meeting, did you have occasion to discuss the proposed merger with Mr. Le Landais?

A The date again, sir?

Q After the January meeting with Mohawk, at any time after that?

A Yes, sir, I did.

Q When for the first time after that date?

A Well, the first time that I definitively recall, and I don't know exactly how the meeting came about, but I did arrange to stop by Merkin and stop to talk to Mr. Le Landais and to amplify the rationale behind the merger. Mr. Le Landais repeatedly took the position that he had a fiduciary responsibility to the private investors, and as much as I desired not to have any dealings with Mr. Le Landais, my

office as president of the company demanded me or demanded of me that I go make that explanation and amplification to him. And that was on February 17th, as my records show.

THE COURT: You went there in person on February 17th?

THE WITNESS: Yes, sir, I did.

Q Would you tell us what was said at that meeting and by whom?

THE COURT: Anyone else present beside you and Mr. Le Landais?

THE WITNESS: There may have been one other individual there, but I don't know his name.

THE COURT: Give us the substance of the conversation.

THE WITNESS: The substance of the conversation was that to amplify --

THE COURT: Just tell us what you said in substance and what he said.

THE WITNESS: He said in substance that it was absolutely essential that Atron find a long-term solution to what appeared to be a most dangerous business posture. I amplified that in detail.

With regard to the lack of success, in particular with regard to the outright sale to other equipment manufacturers, called O.E.M. sales, because that provides cash, that the Mohawk

commitments had been met by Mohawk and that they had the right to manufacture, and that in our opinion they had to consider that seriously. That represented 90 percent of our current sales.

The posture of entering the end user market, which we were trying to do, established a cash need that looked extremely difficult to achieve. The equity market was poor and the bank credit line was poor and the cost of selling to an end user, where you manufacture, have to place it in inventory and you have to finance the sales, the spare parts distribution and the service of that, and you receive your money and only recover your cost at best over about a two-year period, a period to be very discouraging in the long run.

We had looked at other possible acquisitions to improve that long-run picture, without success, and that this opportunity for a merger with Mohawk, with the companies matching as well as they did in both personnel and product, a period to be in the best interest of the stockholders.

Q Did Mr. Le Landais say anything to you on that occasion?

A On those principles it is my recollection that Mr. Le Landais did not disagree.

Q Did he say anything in addition to what you had

stated to him, on any additional subjects?

A I don't recall him saying anything specifically.

Q Did you and Mr. Le Landais discuss whether holders of restricted Atron stock would receive freely transferable Mohawk stock?

A I don't really recall the specific words but having conveyed the essence of our agreement to merge I certainly may have indicated to him the Mohawk management reaction and attitude toward that, essentially that they would do it if they could.

Q After that meeting, which I think you have placed on or about February 17, 1971, when did you next speak with Mr. Le Landais about the proposed merger, if at all?

A My recollection is that I had no further conversation with Mr. Le Landais until approximately May 10th, when he called and asked about what had happened with regard to the exchange of shares.

Q Do you have any recollection of speaking to Mr. Le Landais in April of 1971?

A None whatsoever, Mr. Devine. As a matter of fact, by that time, even the middle of April, there was every reason not to have called Mr. Le Landais. I had every confidence that there was no question but that the merger, in terms of votes returned, would be favorable, furthermore, I had been reassured

by two events that Ladenberg-Thalman had removed their posture of objection to the merger. And I was quite certain of, therefore, a certain percentage of the public votes.

Q How did your conversation with Mr. Le Landais on May 10, 1971, come about?

A Mr. Le Landais called me and said something to the effect that the bank, or my office tells me that the bank has some problem with regard to the transfer of the Atron shares and receipt of Mohawk shares, and I told him that I didn't know anything about it, please contact Mohawk. They are the only people that can answer the question.

Q Was it your testimony that this was the first time when you learned of any difficulty that Atron, former Atron shareholders were having in receiving freely transferable Mohawk stock?

A To the best of my knowledge, that's right, Mr. Devine, yes.

Q Prior to or on January 29, 1971, had the Atron senior officer made any evaluation of Mohawk as a possible merger complement?

A Prior to what date?

Q Prior to the meeting with the Mohawk officers in January, 1971.

A Yes, sir. We looked at several acquisition possibili-

ties and we had considered that a merger with MDS was one possibility and that we tried at least to be reasonably prepared for that eventuality.

As a matter of fact, it was our opinion that Mohawk had to proceed in a product direction that could make extremely good use of our developments. And they had an established sales and service force and also financial resources which were the essential ingredients that we were missing in any substance. So we did have discussions on this matter.

Q At the time that the evaluation of Mohawk was made, was that evaluation based in part upon Mohawk audited financial statements for fiscal 1970?

A I can't say that it was, no, sir. We did not do an analysis of their financial statements, no.

Q Did there ever come a time prior to April 30 of 1971 when the Atron officer group or any member of that group evaluated the financial statements of Mohawk?

A I can't say that we did any analysis on their financial statements.

Q None at all prior to the merger?

MR. UNGER: Objection, your Honor. That question has been asked and answered at least twice.

THE COURT: The question is argumentative. The witness said he didn't.

MR. DEVINE: Withdrawn.

Q Did there come a time when you learned that the financial statements of Mohawk for fiscal 1970 were going to be restated?

A If I had learned of that, I learned of it after the merger had been effected.

Q Did there come a time when you learned that Mohawk was going to change its method of accounting for sales of equipment which had previously been leased?

A Only in connection with their annual report.

Q Annual report for what period?

A For the period -- I believe it was in the annual report for the nine months ending on April 30th.

Q 1971?

A Yes.

Q Did there come a time when you learned that Mohawk had decided to change the date of the end of its year fiscal 1971?

A Yes. I knew that they desired to do so and I learned of that in this manner: Mr. Wells called me and said that he would appreciate if we could do everything possible on our side, and he would on his, to bring about the vote on the merger by April 30th because he wanted the auditing cycle of his international operations and domestic operations to

coincide. My response to that was that we would give it a college try. There was a lot to be done.

Q When did Mr. Wells make this statement to you?

A I can't give you an exact date, Mr. Devine, but sometime between mid February and mid March probably.

Q Did he tell you at that time that the decision to change Mohawk's fiscal year had been made?

A No, sir, he didn't say that. He said that they would like to do it.

Q Did there come a time when you learned that the decision had been made?

A Only after the fact, sir.

Q Excuse me?

A Only after the fact. But I must say that since we had set up and gone out and we were going to vote for the merger, if I go back and say, all right, am I assuming they are going to do that? The answer is yes, but I never consciously went through that rationale.

THE COURT: Wasn't Leidesdorf working on your books in April, of Atron?

THE WITNESS: Yes.

THE COURT: Who was your regular accountant?

THE WITNESS: Hurdman, Cranstown Penny and Company, and they were working together.

Q Did there come a time when you learned that Mohawk was setting up reserves for accounts receivable, inventories and off-rent equipment for fiscal 1971?

A Again, the only access to such information was as a result of the normal receipt of annual report.

THE COURT: I will have to recess for lunch, gentlemen. We will resume at two o'clock.

(Luncheon Recess)

AFTERNOON SESSION

2:00 P.M.

(In open court)

J O S E P H S. S T O U T E N B U R G H, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. DEVINE:

Q Mr. Stoutenburgh, you testified about learning of a change in Mohawk's fiscal year and learning of a change in Mohawk's accounting and learning certain restatements of prior financial statements, at different times. After you had learned all of these things, did you take any action as a president and director of the former Atron Corporation?

MR. UNGER: Objection, your Honor. He couldn't be president and director of a company that ceased to exist.

THE COURT: Well, I suppose that is so.

Did you take any action?

THE WITNESS: No, sir.

Q Between January 29, 1971, and April 30, 1971, did you have occasion to speak with Mr. Karpen?

A Yes, I had occasion to speak to Mr. Karpen on several matters. Mostly all technical matters.

Q During that period, were you aware that Mr. Karpen was an officer of Mohawk?

A Yes.

Q In that period did Mr. Karpen disclose to you that Mohawk was about to or had changed its fiscal year for 1971?

MR. UNGER: Objection, your Honor. He is leading the witness again.

THE COURT: Well, I'll allow it. Answer it yes or no. Did he tell you?

THE WITNESS: No, he didn't tell me that.

Q Did he tell you anything with respect to the rate of lease terminations on Mohawk equipment?

A No, he did not.

Q Did he tell you anything with regard to Mohawk's consideration of accounting changes?

A No.

Q Did you see the Atron proxy statement in any of the draft forms?

A Yes, I did.

Q And did you have an opportunity to comment on the contents of the proxy statement?

A Primarily my comments dealt with the reasons for the merger.

Q Did you have an opportunity to comment on the proxy statement as a whole?

A I'm sure I had the opportunity to do so, but insofar

as those matters that were being handled by independent accounting firms and strictly legal matters, I didn't raise any significant questions with regard to those.

Q Did you ever suggest to anyone that the proxy statement addressed itself specifically to the question of whether holders of restricted Atron stock would receive freely transferable Mohawk stock?

A No, I didn't, because that subject is one that is a matter of strictly of legal determination, and I had no conversations with anybody in between -- that is, anybody with Mohawk or counsel with regard to that subject beyond the January 29th meeting.

Q Did Atron pay John Halsey to be a proxy solicitor in connection with the proposed merger between Atron and MDS-Atron?

A It paid John Halsey to insure that the votes, the proxy material was in the hands of those people that he had major responsibility for in the placement, to insure their votes were in. He was not paid to do anything with regard to saying give me a yes vote. It was necessary, under the laws of Minnesota, to have two-thirds of the outstanding shares, not the shares present but the outstanding shares, in. And since Mr. Halsey had -- it was his associates that had the predominant number of shares in the first private placement, I went to

him for that purpose.

Q I show you page three of Plaintiff's Exhibit 18, which is the proxy statement, and ask that you read to yourself the last two sentences on that page.

Was Mr. Halsey a professional proxy solicitor within the meaning of the last two sentences on that page?

MR. UNGER: Objection, your Honor. That is a question of law.

THE COURT: It may not be. If this witness retained Mr. Halsey and there is a statement in exhibit 18. But I am puzzled as to the relevancy. They had the right to pay him to solicit proxies, did they not?

MR. DEVINE: We don't question that at that point because we don't know whether he was employed by Merkin and Company.

THE COURT: Even so, that is a matter between Merkin and these other people.

MR. DEVINE: I don't elicit for that purpose. I would like to establish that Mr. Halsey during relevant periods was, in fact, a paid proxy solicitor and that the reference in the proxy statement to the cost of that being about $5,000 was to Mr. Halsey.

THE COURT: This witness testified he paid Mr. Halsey to accomplish something with respect to the notices

of the meeting.

Isn't that so?

THE WITNESS: Yes, sir.

THE COURT: Let's go on to something else.

Q Was he paid $5,000?

A No.

Q In the period from January 29, 1971, through April 30, '71, did you speak with Mr. Halsey about the question of holders of Atron restricted stock getting freely transferable Mohawk stock?

A I don't recall the specific language again, but I did relate to Mr. Halsey the basis and reasons for proceeding. And in the course of this I may well have indicated to him Mohawk's positive attitude that they would, in terms of my question of the founders and first private, that it would be desirable from their point and they would do it if they could.

THE COURT: Gentlemen, I have to suspend for a few moments to take a criminal matter. You can leave your papers where you are and return in about ten minutes or less, please.

(Recess)

(In open court)

J O S E P H S. S T O U T E N B U R G H, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. DEVINE:

Q Mr. Stoutenburgh, do you have any knowledge as to whether Mr. Halsey made any representation to any holders of Atron restricted stock as to the type of Mohawk stock they would receive if the merger was approved?

A I have no knowledge of his representation.

Q Prior to April 30th of 1971, did anyone associated with Mohawk tell you that Mohawk was going to seek to begin production of products previously made by Atron?

A I don't recall them stating that in that fashion. Mohawk products into which our units were installed were the only limit of the total products that they were not manufacturing as they had fulfilled their commitment completely in terms of the minimum number required for them to exercise the option to manufacture it. Those of us in management at Atron had to consider the fact that as good businessmen, Mohawk Data had to seriously consider undertaking this manufacturing to improve the margins on their product.

Q Do I understand your testimony to be that no one from Mohawk told you prior to April 30, 1971, we are going to take over that manufacturing?

A I don't recall them putting it quite that bluntly -- I mean in conversations we were reminded that they had that

right.

Furthermore, the agreement to purchase indicated that when we made modifications of that product, that those rights extended to those modifications and that as the product line grew out of that, that that would be a serious consideration.

Q Do you recall being deposed in this case, having your deposition taken?

A Yes.

Q I would like to read you one question and one answer from page 97 of the transcript of that deposition.

"Q Let me run through a couple of categories of people and answer as to each whether or not you had occasion to discuss whether or not restricted stock would be free immediately after the merger with these people: the attorneys for Atron Corporation?

"A Yes."

Now, do you recall giving that answer to that question?

A If it is in the deposition, I gave that answer, yes.

Q Does that refresh your recollection as to whether or not you had any conversations with the attorneys for Atron regarding this subject?

A Well, again, the only conversations that I really had

were to the effect that Mohawk's attitude was such that they would do so if they could.

Q Did you discuss Mohawk's attitude with the attorneys for Atron?

A Only to the extent that I stated, Mr. Devine.

Q Well, all you have stated in this deposition that I have read so far is, yes, you stated that there were such discussions. But now can you tell us what the extent of those discussions were?

MR. UNGER: Objection, your Honor. We are getting into an area of attorney-client privilege?

THE COURT: What?

MR. UNGER: We are getting into an area of attorney-client privilege.

THE COURT: No, but the question is objectionable. We have to make some time with this case. Let's go ahead.

MR. DEVINE: No further questions.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MR. UNGER:

Q Mr. Stoutenburgh, on your examination, your previous examination today, you said that on January 29, 1971, Mr. Rifenburg told you, in answer to a question that it would be desirable for Mohawk to give the Atron private placement

holders Mohawk stock free of restrictions if they could, but that it was a legal matter. Is that so?

A Essentially, yes. That is the substance of it.

Q You also stated on your direct testimony here that on April 30, 1971, you believed that the Atron private placement holders, other than certain people in the inside management group of promoters, were going to receive Mohawk stock free of restrictions on the merger. Isn't that so?

A Yes, I made that statement.

Q Now, upon what did you base your belief?

A My belief that Mohawk had stated that they desired to do so and they would if they could, and I had had no other conversations with them in between.

Q Was there anything that you saw in the Atron proxy statement that served to reinforce your belief?

A No.

Q Now, between January 29, 1971, and April 30, 1971, did you talk to anybody at Mohawk with respect to that particular subject, whether or not the Atron private placement holders would be getting Mohawk stock free of restrictions on the merger?

A Absolutely not. The subject was one that if they could do it, that was great. If they couldn't, that is understandable, being a legal question.

Q Did you have any conversations with Mohawk's lawyers, either outside lawyers or inside lawyers, with respect to that subject matter?

A No.

Q Now, would you tell me briefly what you know about the subject of restricted stock and the restrictions on the stock?

A Well, only what I know in the purchase agreement, which makes a statement that, from what I can recall of it, the statement that it can be sold only if it is registered or in special cases with opinion of counsel. And essentially -- and then the registration carried with it certain agreements that it could be registered in piggyback if it is agreed to by the underwriters. But I don't know what constitutes the legal aspect of that question. I never inquired in depth into it, nor did I ever get any clear understanding of what any such ground rules would be.

Q Now, did you ever tell Mr. Le Landais, between January 29, 1971, and April 30, 1971, that the Atron private placement holders would be receiving Mohawk stock free of transfer restrictions on the merger?

A No, I did not say that.

MR. UNGER: No further questions of this witness.

THE COURT: Any redirect?

MR. DEVINE: No redirect.

THE COURT: All right, you are excused, Mr. Stoutenburgh.

(Witness Excused)

MR. DEVINE: Your Honor, I will call Ronald Hengen.

R O N A L D H E N G E N, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEVINE:

Q Mr. Hengen, in April of 1971, were you associated with the firm of Bejan and Hengen?

A Yes.

Q I show you a press release dated May 4, 1971, which is Plaintiff's Exhibit 22 in evidence, and I ask did you prepare the first draft of that press release?

A I assisted in the preparation of the first draft.

THE COURT: Hasn't this been testified to by Mr. Wells?

MR. DEVINE: Yes.

THE COURT: What is there that Mr Wells testified to which this witness will cover which didn't come out before?

MR. DEVINE: I would only like to ask him with respect to the last paragraph on the second page, the timing

of the drafting of that paragraph.

THE COURT: All right.

Q Mr. Hengen, would you tell us with respect to the last paragraph on the second page your best recollection as to how that paragraph came to be written in its present form?

A I believe it was Wednesday or Thursday of the week prior to the meeting on May 4th, I was called to Mr. Wells' office and as usual he and I sat down and covered the various points tnat would be -- were to be covered in the forthcoming press release. That, in very general terms, was the subject matter. Various accounting matters, establishment of reserves, and so forth, was one of the things that he mentioned. I made a list as usual.

I returned to Mr. Wells, it must have been Friday morning, with a prepared draft, at which point we probably made minor word changes, and so forth. I do recall one item specifically that was left out, was the backlog in the title because he didn't have that number and he wanted to check. He wanted to have the whole release approved by Mr. Rifenburg either over the weekend or Monday because our meeting was scheduled for the following Tuesday.

Q Were you party to any conversation with Mr. Rifenburg prior to May 4, 1971, with respect to this press release?

A No.

THE COURT: Did that paragraph, the end of page two, exist in its present form when for the first time?

THE WITNESS: To the best of my recollection, Friday morning.

THE COURT: And the date of Friday morning is what, gentlemen?

MR. DEVINE: April 30, 1971.

THE COURT: All right.

Q Did you attend the interview between Mr. Wells and the Wall Street Journal on or about May 3, 1971?

A No, I don't recall that I did.

Q In your capacity as a public relations man for Mohawk, at any time after May 4th of 1971 were you asked on behalf of Mohawk to make a request of the Wall Street Journal that the article which appeared about Mohawk on May 5, 1971, was retracted or corrected?

A I was not asked by Mohawk but I asked Mr. Wells that question.

Q What was his answer to that question?

A His answer was well, it didn't seem to be material at the time and the Wall Street Journal and other papers and trade press frequently make such errors, particularly on a release of this length and complexity, which was the whole

reason for that meeting with Mr. Schmedel.

THE COURT: What was the error to which you had reference in your last answer?

THE WITNESS: Well, the approach taken in that May 5th article.

MR. DEVINE: I show the witness Plaintiff's 23, your Honor.

THE WITNESS: We had in the release mentioned that certain of these various accounting matters were under review. That is as far as we ever went and certainly as far as I ever went up to and after that time. And the story came out in the Wall Street Journal, certainly giving a strong impression that the decision had been made, and to my knowledge no ~~discussion~~ decision had been made.

Q However, you have no recollection of the interview between Mr. Wells and the Wall Street Journal?

A No. I don't believe I was there.

MR. DEVINE: No further questions.

THE COURT: Any cross examination?

MR. UNGER: No questions of the witness at this time, your Honor.

THE COURT: All right, you may step down.

(Witness Excused)

MR. DEVINE: Your Honor, I am at this point unable

* * *

* * *

on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UNGER:

Q By whom are you employed, Mr. Gregory?

A Loeb Rhoades and Company.

Q In what capacity?

A As a vice president in charge of the bond department.

Q And would you give me a brief statement of your background?

THE COURT: Do you have it written out?

MR. UNGER: Just in rough. It will only take a few minutes at the most.

A I entered the security business in 1957 as an employee of Gregory and Sons, a member firm of the New York Stock Exchange. I became a partner in 1960. Gregory and Sons was put in liquidation in October, 1969. I spent a year with the firm doing that, and in the summer of 1970 came to Loeb Rhoades.

Q Now, when you were with Gregory and Sons, what did you do with that firm?

A Gregory and Sons, I was the partner in charge of the syndicate department. I was involved in the underwriting and syndication of high grade corporate bonds, and the latter

years of Gregory existence was involved in the underwriting syndication of equity offerings and various roles in managements.

Q Gregory and Sons members of the New York Stock Exchange?

A They were.

Q Were they investment bankers?

A Yes.

Q Did they underwrite emerging computer companies?

A Among others, yes.

Q Did there come a time when you were engaged in the winding up of Gregory and Company?

A Yes. That was from October, '69 -- well, it is still going on but my basic involvement was through the summer of '70.

Q In connection with winding up Gregory, did you have any dealings in private placement securities?

A Yes. As a result -- well, the firm and partners participating in some restricted securities on a private placement basis and for the firm and partners and also as underwriting compensation in the public offering of some of these companies, Gregory and Sons, and the partners had exposure and holdings in these securities.

More directly in -- the firm was put in liquidation

in 1969. One of the major assets of the firm at that point were holdings in various companies of restricted securities. From October, '69, to currently, but more in the year '69 and '70, I was involved in the attempt to sell these securities.

Q Are you familiar with Mohawk Data Sciences Corporation?

A Yes.

Q Are your familiar with the stock of that particular company?

A Yes.

Q Did Gregory and Sons maintain a market in that stock at any time?

A Yes. When it was in the over-the-counter market we were one of the market makers prior to its listing.

Q Are you familiar with Atron Corporation?

A Yes.

Q Are you familiar with the price activity of that particular stock?

A Yes.

Q Do you have an opinion as to the market value of stock bearing restrictions on transfer as opposed to freely tradeable stock in the period 1970, 1971?

A Yes.

Q And what is that opinion?

A Well, restricted stock had a substantially less market value than a free stock.

Q And what is the basis for that opinion?

A The ability of the holder to sell it.

Q Do you have an opinion as to the salability of stock bearing restrictions on transfer of a New York Stock Exchange listed company as opposed to similar stock of an over-the-counter company in the period 1970, 1971?

A Yes. As a general rule, a listed security, particularly one on the New York Stock Exchange, would have more market acceptance, same ability in following than an unlisted stock. There are obvious exceptions.

THE COURT: Are you talking about restricted stock?

THE WITNESS: Restricted or public.

Q Do you have an opinion as to the salability of Mohawk Data Sciences stock bearing restrictions on transfer as opposed to the stock of Atron Corporation bearing similar restrictions on transfer?

MR. DEVINE: I object. My understanding is that the stock of either company is restricted and it can't be sold.

THE COURT: That is not the Court's understanding but you will have an opportunity to cross examine. He is

merely being asked if he has an opinion.

Do you have an opinion, yes or no?

THE WITNESS: Yes, I have an opinion. I would think that Mohawk Data being a listed security would have a better chance of being sold than an unlisted stock.

Q What is the basis for that opinion?

A Again, I think it is the stature of having a listing, the following, the interest, the potential buyers, the amount of stock outstanding.

Q Now, are you familiar with the prices of the Mohawk stock traded on the New York Stock Exchange for the period of approximately January 15, 1971, through April 30, 1971?

A Yes.

Q And are you familiar with the over-the-counter prices of Atron for that same period?

A Yes.

Q You have seen the stipulation in this case with the Mohawk prices on it?

A Yes.

Q And you have looked at the pink sheets, which are Defendants' Exhibit Z in evidence in this case?

A Yes.

Q All right. Now, I ask you to look at this chart and tell me whether this is a fair representation, graphic

representation of the prices of the Mohawk stock and the Atron stock in that period of time.

MR. DEVINE: Your Honor, I think I should have an opportunity to examine this chart before the witness testifies.

THE COURT: Well, not necessarily but I understand the man is going to Europe or something.

It should be marked for identification.

If you need to examine on it before cross examination I will have to accommodate you.

xxx (Defendants' Exhibit AC marked for identification.)

THE COURT: Do I understand that this is a graphic representation of the market price of unrestricted stock?

MR. UNGER: The Mohawk public stock.

THE COURT: Free stock?

MR. UNGER: Free stock.

A What was your question again, is that a fair representation?

Q A fair graphic representation of the prices of the Atron stock traded in the other over-the-counter market and the Mohawk stock traded on the New York Stock Exchange for those periods of time?

A Yes.

Q Do you know when the boards of directors of Mohawk

and Atron voted to approve the plan and agreement of merger?

A As I recollect, it was the end of March.

Q I think it is stipulated it was the beginning of March.

Q Now, I would ask you to look at that chart and tell me if you have an opinion as to the reasons for the rise in the price of the Atron stock from early March, 1971, through April 30, 1971.

A Yes. Once the merger had been announced and the boards met on it, the Atron stock would follow relative to the exchange the price of Mohawk stock. As Mohawk goes up so would Atron.

Q What is the basis for that opinion?

A (A), it's a merger. The holders of Atron are going to receive Mohawk stock, plus there probably would be an arbitrage between the two companies on the market.

MR. UNGER: No further questions of the witness, your Honor.

THE COURT: All right.

I understand that that graph is purely a matter of public record, in other words, it has been taken from the pink sheets and from the New York Stock Exchange quotations. Is that right?

MR. UNGER: Yes, your Honor.

THE COURT: All right.

MR. UNGER: All we did is take the prices here, I think the bid and prices stipulated for Mohawk and put it on the graph.

THE COURT: Mr. Devine can have the opportunity to verify the mathematical accuracy of it. He need not do it today.

MR. UNGER: I offer that in evidence.

MR. DEVINE: I do not know at this time, your Honor, whether I will have an objection to its acceptance.

THE COURT: I will take it subject to your motion if you find it is not correct as represented.

xxx (Defendants' Exhibit AC is received in evidence.)

CROSS EXAMINATION

BY MR. DEVINE:

Q Mr. Gregory, as to one of the opinions you just gave, you said there were some exceptions. Do you recall which of the opinions it was, to which there are exceptions?

A Yes. I think if I remember the question, it related to the price of a listed stock vis-a-vis over-the-counter, not the price but the value. And my reservation of that with certain insurance companies, commercial banks which are so-called quality stocks and at that point many of them were not listed on the New York Stock Exchange.

Q Well, whatever the difference in stature, representation as a function of being listed or not listed, isn't that taken into consideration by the public, by the market with respect to O.T.C. stocks? Doesn't their market price reflect that difference in stature?

A It very often will.

Q But wouldn't the restricted stock have a percentage value roughly the same for O.T.C. stock as listed stock in that the prices already discount that stature?

A I don't think so. I think -- whether it is the listed stock or restricted stock, you have a stature, a following, a supply, a flow, a potential buyer that in most cases is considerably more on a listed security than it would be over-the-counter.

Q But don't those things effect the market price of the over-the-counter stock?

A Not necessarily because the over-the-counter securities is a very small market with few market makers, very small flow. It is not a large market, large following, large buyers and sellers.

Q And your testimony is that this would have no effect on the price of the O.T.C. stock?

A Come back to your question again.

Q As I understood your opinion, it was that in

putting on one hand a restricted listed stock and on the other hand a restricted O.T.C. stock, that the value of the restricted O.T.C. stock might be a lesser percentage of the market value than the value of the listed restricted stock?

A That's correct.

Q I am saying doesn't the O.T.C. market price for unrestricted stock already take into consideration those factors which you indicated would be the factors that would account for a lesser percentage?

A No. I think as a general rule no. That is my own experience in our own firm selling restricted stocks of over-the-counter companies.

Q Did you prepare this chart which is Defendants' Exhibit AC?

A No.

Q Do you know by whom it was prepared?

A I imagine Beekman & Bogue.

Q You had nothing to do with it?

A No.

Q Is it possible that there could be explanations other than the tracking of Mohawk's price by the Atron price for this graphic representation?

A I think the graph -- I am not sure I understand your question.

Q Well, if we showed you any two stocks which had market prices that looked like this, graphically displayed, would you automatically conclude just from looking at the price matching that one was tracking the other?

A Not necessarily, but if you are talking about companies that have -- in effect are consummating a merger I would say so. You could put two entirely different stocks there that may be tracking it some way, unrelated companies.

Q Could the factors that would explain that relationship also possibly explain the relationship between two companies that agreed to a merger?

A I am not sure I understand your question.

Q Because two companies that had prices graphed like this --

A Any two companies you are saying?

Q Yes. Because those two companies had agreed to a merger, subject to approval of the shareholders and their prices, looked like this, does that necessarily mean to you in your expert opinion that one stock is tracking the other or could there be other explanations?

A Of two companies that have tentatively agreed to a merger?

Q Yes.

A I would say one stock would be tracking the other.

Q Necessarily?

A Yes.

Q Which stock is tracking which?

A Well, in that case it would be Atron tracking Mohawk, the acquiring company.

Q Is that necessarily so?

A I would think so.

Q You would think so or are you sure?

A I am sure.

THE COURT: Do you read from this chart that the market or the customers had generally concluded that the merger would go through?

THE WITNESS: Yes.

THE COURT: All right.

Q What if there was doubt as to that?

A Are you taking a for instance, if there was doubt?

THE COURT: He is asking you to assume there was doubt whether the merger would go through, would that affect your opinion as to what the chart should indicate?

THE WITNESS: If the stockholders felt that the merger was not going to go through it is possible the stocks would react independently.

Q Did you make a study as to whether or not during this period of time the merger was certainly going to go

through?

A My understanding of it is that the merger was going to go through.

Q What is the basis of that understanding?

A The reading I have done and just the general understanding I have of it. I am not a security analyst expert. I don't profess to be. I have no reason to believe otherwise.

Q Do you have any reason to believe that, however?

A What?

Q That the merger was going to go through?

A Yes.

Q What is the basis for your belief?

A The agreement of the board of directors.

Q And have you studied it any further than that?

A No.

Q What if during this period of time, after the board of directors had agreed to this, Mohawk had announced some information which the general public felt to be negative about that company, would you then have the same certainty that the merger was going to be approved?

A I think that's the nature of the information.

Q What if it was negative?

A That's a big "if". Was there?

Q Well, you are the expert. Did you make a study to

find out if there was any negative information during that period which could have been announced?

A No.

Q Do you know that Mohawk's financial statements for the year prior to this were restated downwards subsequently?

A Yes.

Q Suppose that had been announced during this period, would you then think there might be some doubt about the approval of that merger?

A No. I am not qualified, I don't think, to necessarily answer that. My answer would be no. It might be reflected in the price of the stock possibly, but I don't think so, no.

Q You think it might cast some doubt on whether or not the merger would be approved?

A I am hesitant to give you an opinion because I don't profess to be an expert on that.

MR. DEVINE: No further questions.

I would like to reserve the opportunity --

THE COURT: Yes, you have that.

MR. UNGER: No redirect.

THE COURT: You are excused.

(Witness Excused)

THE COURT: 10:15 tomorrow, gentlemen.

(Adjourned to 2/14/74 at 10:15 A.M.)

TRANSCRIPT OF PROCEEDINGS

[Caption and Docket No. Omitted] Filed: August 19, 1974

New York, New York, February 14, 1974

Honorable Charles L. Brieant, District Judge

APPEARANCES OF COUNSEL:

For Plaintiffs: Michael C. Devine, Esq.

For Defendants: Martin P. Unger, Esq.
Milton Weiss, Esq.
Kenneth A. Raskin, Esq.

* * *

February 14, 1974

10:00 AM

* * *

THE COURT: Is he being offered as an expert on the purchase and sale of securities?

MR. UNGER: No, your Honor, he is a fact witness.

THE COURT: All right, let's keep it very brief then.

A I joined --

MR. UNGER: If you will permit me to lead him a little bit I can do it quicker.

THE COURT: Yes, sure.

Q Were you employed by Stralem Company from 1968 through early 1969, Mr. Halsey?

A Yes.

Q And from February, 1969, through May of 1970 you were employed by Hamerschlag-Borg and Company or its corporate affiliate Hamburg Securities?

A That's correct.

Q From May, 1970, to the end of March, 1971, you were employed by Merkin Company, is that correct?

A Correct.

Q Subsequent to that, March of '71, who were you employed by?

A Partner of Wallach and Company.

Q And did you as an employee of Stralem and Company participate in the private placement of Atron stock that took

* * *

Q About when was the time that Hamerschlag was no longer going to be an underwriter in that offering?

A I am sorry.

Q About what time was it that you learned that Hamerschlag was no longer going to be or Hamburg Securities was no longer going to be in that offering or to be an underwriter in that public offering?

A It was during the summer 1970 -- '69. Beg your pardon, during the summer of 1969, thank you, that it was determined Hamerschlag-Borg could not participate in the underwriting at all.

Q Did there come a time after that time when you had a conversation or conversations with Mr. Le Landais concerning that subject?

A Yes.

Q Was it one conversation or more than one?

A The sum and substance of it --

Q Was it one or more than one?

A Pardon me?

Q Was it one conversation or more than one conversation?

A It was probably more than one.

Q At about what period of time with relation to the summer of 1969 did they take place?

A I believe August.

Q Now, can you tell me, if you can differentiate by conversation, tell me it by conversation. If you can't --

THE COURT: Before I take the conversation, I want to know where and who else, if anybody, was present, as well as the approximate time.

Q Where did these conversations take place?

A The conversation happened in front of the Morgan Guaranteo Trust Building, as we were walking together from the Ladenberg-Thalman office, he was livid --

Q Was anybody else present?

A No.

Q Tell me what the conversations were.

A He was livid at Joe Stoutenburgh, who the Court may know is my brother-in-law, for Stoutenburgh now upholding Le Landais' wishes for compensation in the form of stock options.

THE COURT: You mean he told you this?

THE WITNESS: Yes. He said several unprintable words that are not needed in court. The man had a lack of moral fiber. Unfortunately, he was not upholding Le Landais' wishes at all.

Q Now, subsequent to that conversation did you have any other conversations with Mr. Le Landais on the subject

of Mr. Stoutenburgh.

A Subsequent.

Q Subsequent to that one?

A Many times. I was an employee --

Q Was anybody else present at any of those conversations?

A Usually only he and I were together on those.

Q And where did they take place?

A Usually in either his office or my office.

Q At Merkin or Hamerschlag-Borg, which?

A Both places, but usually most of them related to Merkin and Company at a later point in time.

Q About when were these conversations?

A Mr. Le Landais had contacted Mr. Stoutenburgh regarding a merger possibility of Atron into Data-Card Corporation of Minneapolis, St. Paul area. Le Landais felt that Stoutenburgh owed a fee for this introduction --

THE COURT: Not what he felt, if you please. Just tell me what he said.

THE WITNESS: He said Mr. Stoutenburgh owes us or owes me a compensation or a fee for this introduction.

Your Honor, I am not versed in court language.

THE COURT: I understand that. Just answer counsel's question. That's all you have to do. I only take conversations,

* * *

* * * *

A I think I would be superfluous.

Q Did there come a time when you learned that Mohawk or there was going to be a merger of Atron to Mohawk or a Mohawk subsidiary?

A Yes.

Q When was that?

A That was the end of January, 1971, on a Saturday morning.

Q How did you learn about that?

A Joe Stoutenburgh called me at my ski house in Vermont about eight o'clock in the morning from Minneapolis, his home. He said, "John, we have just agreed with Dick Rifenburg to proceed on a merger, and acquisition by Mohawk of Atron."

I was most elated personally --

Q What did you say to him?

A Joe said, "We have made a deal that is a combination. We are going to receive one share of Mohawk for each four shares of Atron Corporation."

I was most elated that this combination was going to take place because Atron Company, in my opinion, could not make the grade marketing its own products. They hadn't up to this point. Mohawk was doing about 90 percent plus of the marketing of the product. It seemed like an extremely fortunate combination.

Q Did you speak with him about the merger ratio at that time?

A Yes.

Q What did you say? What was the conversation about the merger ratio?

A Two comments: (1) I was very pleased, second, I said, "Could you push Dick any further?"

He said, "It was an extremely fair combination."

Q Who is the "Dick" that you are referring to there?

A Mr. Rifenburg.

Q And was anything said in that conversation respecting whether or not either yourself or any other Atron private placement holder would be receiving Mohawk stock free of restrictions or with restrictions on the merger?

A There was no conversation.

Q Now, did there come a time when you had any conversations with Pierre Le Landais about the merger?

A Yes.

Q And was it one or more than one?

A Because he and I were together in the offices day to day, why, yes, it started probably the following Monday or Tuesday after that Saturday.

Q That would be February 1st or 2nd?

A Yes.

Q And that was the offices of Merkin?

A That was in Merkin's offices.

Q And was anybody else present at that particular conversation?

A No.

Q Now, would you tell me about that conversation, what you said to Mr. Le Landais and what he said to you.

A I cannot give you an exact recount of the words but only the sense of it. He and I were both pleased with the combination of the two companies. There was a basic reflection that, thank goodness, now our private shareholders all would be able to have an ongoing business and not lose everything that they had.

Q Now, you were an Atron private placement holder at that time, weren't you?

A Yes.

Q You had bought back in the first placement?

A Right.

Q And did you continue to hold Atron stock through the effective date of the merger on April 30, 1971?

A Yes.

Q You hadn't sold any of your private placement stock?

A No.

Q In that conversation, was anything said about the merger ratio, the four for one ratio?

A We were just pleased that it was done.

Q And was anything said in that conversation about the subject of freeing up the Atron stock through the merger?

A No.

Q Did you have any other conversations with Mr. Le Landais after that one with respect to the merger, the Atron merger?

A Not that I recollect.

Q Now, taking the period from January 29, 1971, through April 30, 1971 --

A Excuse me. Maybe I had better interject. You said had I talked at all further about the merger?

Q The merger to Le Landais after that conversation.

A From February or the first of February on to the time that I left Merkin?

Q Right.

A We, from time to time, had casual conversations, yes.

Q Well, was anybody else present at any of those conversations?

A Possibly an analyst at some point in time who worked for us.

Q And were those conversations all at Merkin and Co.?

A Yes.

Q Did any of those conversations or in those conversations was there any discussion about whether or not the Mohawk stock to be issued on the effectiveness of the merger, whether that stock would be free of restrictions or continue to bear restrictions similar to those on the Atron private placement stock?

A No, no discussion.

Q Was there any discussion about the merger ratio in any of those discussions, those further conversations?

A Undoubtedly we had reflected on what the merger ratio was but there hadn't been any real conversation at all.

Q Now, from the time when you first learned of the merger through April 30, 1971, did you have any conversations with anybody concerning the subject of whether or not the Mohawk stock to be issued on the effective date of the merger would continue to bear the restrictions, similar restrictions to those to which the Atron private placement stock was subject to or whether that Mohawk stock would be free of such restrictions?

A You said did I have any conversation as to whether the shares would be still restricted or not restricted?

Q Right.

A The answer is no.

Q I show you Plaintiff's Exhibit 27 in evidence and ask you if you have seen that document.

A Yes.

Q When did you first see that document?

A I cannot give the exact date. Without question within a matter of a day or two days or three days after it was written.

Q And you read it when you got it?

A Yes.

Q Did you have any conversation with Mr. Le Landais respecting the subject of that document?

A Yes. I didn't agree with the assessments made by Mr. Auslander because I frankly didn't think he was competent to make a good evaluation of it.

Q That's what you told Mr. Le Landais?

A Yes.

Q What did he say to you?

A He said that's the way I felt. That's my trouble.

Q Now, did there come a time when you were retained to insure that proxy material was in the hands of Atron shareholders?

A Yes.

Q And when, approximately when was that?

A Somewhere in the immediate time that I joined

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A He said that's the way I felt. That's my trouble.

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A Yes.

Q And when, approximately when was that?

A Somewhere in the immediate time that I joined

Wallach and Company, which was the first of April, 1971.

Q Who retained you?

A Joe Stoutenburgh, the president of Atron.

Q Now, did he do it on the phone or was it in a face-to-face meeting or by letter, how was it done?

THE COURT: What difference does it make? I don't detect any basis --

MR. UNGER: I just wanted to establish the conversation, that's all.

THE COURT: I don't detect any basis which rendered it improper for the man to distribute proxy materials. I don't think it is contended that he could not do it.

Q What did Mr. Stoutenburgh tell you he wanted you to do?

A He asked me to contact all of my private holders and any others that I saw fit to contact if we found that their proxies were not getting in punctually. Also after -- I didn't receive any of the material until after I had received my own and I got extra copies from the company or from the lawyers, I don't know which, to send out or hand deliver to any of my private holders.

Q Now, with reference to the date of that proxy material, which is April 16, 1971, when did you first start contacting Atron shareholders?

A Probably -- I don't have a calendar but probably around the 20th of the month.

THE COURT: Was this being done because you anticipated that Ladenberg-Thalman's people would vote negatively? Is that why you were doing this?

THE WITNESS: No.

THE COURT: What was the purpose of doing this?

THE WITNESS: Mr. Stoutenburgh asked me to do it.

THE COURT: Did he tell you why he wanted you to do it?

THE WITNESS: Yes.

THE COURT: What was that?

THE WITNESS: He wanted to have the shares all in there and voted.

THE COURT: Because of anticipated negative voting?

THE WITNESS: No. Simply because we needed a two-thirds -- as I remember it, two-thirds of the outstanding shares needed to vote, and I had a substantial number of shareholders, or I was responsible for a substantial number of shareholders, and all my people were delighted, to my knowledge, with the whole program.

THE COURT: What was the approximate percentage, if you remember, of Atron's which your people had?

THE WITNESS: I was responsible, your Honor, for

approximately 400,000 shares of the original offering, which later became 200,000 shares.

THE COURT: How much was outstanding on the date of the merger, if you remember?

THE WITNESS: Approximately -- I am not sure but approximately a million one.

THE COURT: In other words, you were about fifteen percent, were you, whatever it adds up to?

THE WITNESS: Right.

THE COURT: All right, let's move along.

Q Now, you pointed out just previously the names of people that you had placed Atron stock with.

A Right.

Q Now, could you tell me of those names, and if you need the list I will give it to you, who you contacted?

A I called on --

THE COURT: Did he contact any of these plaintiffs?

MR. UNGER: No, your Honor.

THE COURT: Did he contact any of these plaintiffs?

MR. UNGER: Not as far as I know.

THE COURT: Then I fail to see the relevance. We are not trying the case of the other people. I don't see any relevance. He had a perfect right to go out and contact them and he did. I really don't see how it bears on the

issues raised here. If you showed me that he contacted a plaintiff in this case, then I will take the testimony.

Q Let me ask you the question. Did you contact any one of the plaintiffs in this case? Are you familiar who they are?

A I don't know who the plaintiffs are.

Q Coronet Fund?

A I am sorry?

Q Coronet Fund?

A No.

Q Creative Capital Fund?

A No.

Q Research and Sciences Investors?

A No.

Q International Technology and Natural Resources?

A No.

THE COURT: Creative Capital.

Q Creative Capital?

A No.

Q Pierre Le Landais or Pierre J. Le Landais and Co., Inc.?

A No.

Q Now, did anybody whom you contacted ask you whether or not they would be receiving -- any of the private placement

holders you contacted ask you whether or not they would be receiving free Mohawk stock on the merger?

A No.

Q After April 30, 1971, did any of the persons whom you contacted or whom you had placed Atron private placement stock with call you to complain that they had received Mohawk stock bearing restrictions similar to the restrictions on their Atron stock?

A No.

Q I show you Plaintiff's Exhibit 28 in evidence and ask you if you have seen that document.

A I don't remember.

Q And you received the proxy material?

A Yes.

Q The proxy statement?

A Yes.

Q And did you read that proxy statement?

A Yes.

Q Was there anything in that proxy statement that led you to believe that you would be receiving, you personally as an Atron shareholder, private placement holder, would be receiving Mohawk stock free of transfer restrictions on the merger?

A No.

Q Now, you also looked at the financial information contained in that proxy statement?

A Not closely.

Q If you had known at that time that Mohawk, as it subsequently did, was going to restate its financial statements for its fiscal year ending July 30, 1970, because of a change in the method of accounting for sales to third party lessors, would that have changed your mind about whether or not the merger was something that should happen?

A No.

Q How did you vote for the merger? How did you vote on the merger?

A I voted for it. The sum and substance of the requirement of the two companies being together was so totally all encompassing and overpowering that I had approximately $400,000 of my clients' capital tied up in a private placement. If I could get those people so they would not lose their shirt, I was 100 percent for it because I knew with Dick Rifenburg's marketing talent and with the great product that Atron had, we had one nifty company that would make the grade. Without it we, as Atron private holders, had no recourse. We would go down the drain.

MR. UNGER: No further questions of the witness, your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. DEVINE:

Q On April 30, 1971, were you a holder of Atron restricted stock?

A Yes.

Q On that date did you believe that you would receive free Mohawk stock, freely transferable Mohawk stock if the merger was approved?

A No.

Q You didn't?

A No.

Q Did you believe that you would receive restricted Mohawk stock if the merger was approved?

A Yes.

Q What was the basis of that belief?

A We were under a letter of investment. We had executed when we had purchased the shares, and after the holding period was past, which is usually three years, why at that point in time we could get a letter -- a no action letter. I believe at that time we would be freed up or could be freed up should we so desire.

Q On April 30, 1971, was it possible for Mohawk to register the stock it was going to issue as a result of the

merger, register it under the 1933 Securities Act?

A I didn't know.

Q You didn't know that?

A No.

Q Did you consider whether that was a possibility?

A No, I didn't.

Q Did you ever discuss that with Mr. Stoutenburgh?

A No, I did not.

Q Did you ever discuss with Mr. Stoutenburgh his conversations with the Mohawk people at the January 29, 1971, meeting?

A Yes.

Q And what did he tell you on the subject of freeing Mohawk stock which was discussed at that January 29th meeting?

A There was no discussion between Mr. Stoutenburgh and myself on that subject.

Q You never discussed that with Mr. Stoutenburgh?

A Never discussed it, no, sir.

Q Did Mr. Stoutenburgh visit you and Mr. Le Landais at the offices of Merkin and Co. on February 17, 1971?

A I have tried very hard to relate on that point. I do not remember. I am told that Mr. Le Landais and Mr. Stoutenburgh had a meeting. I sat in an office that was about

the size of this room with a desk in the corner, supervising that office. We had a smoke glass window and I may have seen Mr. Stoutenburgh go past that. I may have. I am not sure.

Q He didn't visit you on that day?

A Not me.

Q He may have been in the office on that day and not said hello to you?

A He may have been. I am told that he was but I am not aware of it.

Q He didn't come over and say hello to you?

A No.

Q During the period from January 29th through April 30, 1971, did Mr. Stoutenburgh ever come to the offices of Merkin and Co. and say hello to you?

A I don't remember.

Q You don't remember a single occasion during that period?

A No, I do not.

Q Do you recall whether on April 30, 1971, you had certain contractual rights to have Atron register the restricted Atron stock which you held at that time?

I am sorry, would you do that again?

THE COURT: Read it back.

(Record read)

A No.

Q You weren't aware of any such rights?

A No, I was not.

Q When you purchased Atron stock in the first private placement, did you sign a subscription agreement?

A Yes.

Q Did you read it?

A Yes.

Q And you don't recall any contractual rights to registration contained in that agreement?

A I do not.

Q And did you recommend to your clients that they make purchases of Atron stock subject to that same stock purchase agreement at that time?

A Yes.

Q And you made that recommendation without knowing whether or not there were registration rights contained in that agreement?

MR. UNGER: Objection, your Honor. He is talking about 1969. Before that he was talking about '71.

THE COURT: Well, it's cross examination. I will allow the question but I think it's getting a little argumentative. Whatever is in the subscription agreement is what it contains. If he has forgotten about it or never

noticed to begin with, that makes no difference. The legal effect of it is the same in any case.

Let's go on to something else, if you will.

MR. DEVINE: I have no further questions.

THE COURT: Any redirect?

MR. UNGER: No redirect.

THE COURT: You may step down.

(Witness Excused)

O. S E A B U R N E A T O N, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UNGER:

Q By whom are you employed, Mr. Eaton?

A Mitchell, Hutchins, Inc.

Q And were you so employed in May of 1971?

A Yes.

Q When did you first come to Mitchel Hutchins?

A In June of 1968.

Q And you are here pursuant to a subpoena served upon you?

A Yes.

Q By the defendants?

A Yes.

Q And what position were you employed by Mitchell Hutchins in May of 1971?

A Security analyst.

Q For how long prior to that time had you been a security analyst?

A Since June of 1968.

Q Now, were you aware that Mohawk had a security analyst meeting at its plant in King of Prussia, Pennsylvania, on May 4, 1971?

A Yes.

Q Were you present at that meeting?

A Yes.

Q About how many analysts were there, if you recollect?

A Somewhere between 40 and 60, I'd guess, but I'm not very good at guessing.

Q Now, would you tell me something about what happened at that meeting?

A Well, I only have a vague recollection of the meeting and what was said. The meeting took place on a factory floor that had not yet been occupied. There were a number of large meeting kinds of banquet tables which were set up and in front of the room were a number of people from Mohawk. Dick Rifenburg, Wayne Wells, Ron Hengen was there as well, and a number of people from the King of Prussia

plant involved in those products.

Q Do you remember what Mohawk said at that meeting?

A What who said?

Q Do you remember what Mohawk told the security analysts at that meeting?

A I don't remember any of the conversation. I have looked over notes that I took during that meeting but I don't remember any of the conversation or any of the speeches.

Q Let me show you Defendants' Exhibit AA for identification and ask you if those are the notes to which you just referred.

A Yes.

Q And did you take those notes as the meeting went along?

A Yes.

Q And were those notes made by you in the regular course of your business as a securities analyst?

A Yes.

Q And was it the regular course of your business as a securities analyst to take those notes?

A Yes.

MR. UNGER: I would ask those notes be marked in evidence, your Honor.

MR. DEVINE: Your Honor, I can't read these notes.

* * *

necessarily done. I guess it's almost more of an exception, although more generally true at larger meetings.

I have looked through the file and I don't have a handout that was given there with any notes that indicated I had taken it there. A press release in my files.

THE COURT: Relating to that particular meeting in King of Prussia?

THE WITNESS: Yes.

Q Were you following the computer companies at that time, computer peripheral companies?

A Yes.

Q Now, if I were to tell you, and this has been stipulated, that Mohawk announced it was going to change its fiscal year on that day, as a securities analyst what would that have meant to you in terms of Mohawk, the change in the fiscal year?

A Specifically the change from July 31st to April 30th?

Q Right.

A None. From that date, from July to April, made no difference at all. It would have been nicer to follow the company if they changed it to December 31st but in this case they didn't.

Q Now, let me direct your attention to page three of those notes, Defendants' Exhibit AA. The words "End S.O.L.R.,

number 7, 2Ms, will probably treat as rental equip."

Do you remember anything about what those notes mean?

A Well, S.O.L.R. stands, in my mind, for sale of lease rights.

THE COURT: Sale of what?

THE WITNESS: Lease rights. It's a notation that came from control data and was easier. It means the same thing in my mind.

The seven with a dollar sign preceding it and the Ms is seven million dollars. "Will probably treat as rental equipment," refers that in the future, following the sale of lease rights, they might well treat that equipment, the revenues, the cash flow from that equipment as ongoing rental revenues.

Q And would that particular information that was given you have any effect on your thoughts about Mohawk?

A Yes.

Q What was the effect?

A It meant that the revenues from previously sold equipment, the rental revenues from that equipment would now come into Mohawk's reported revenue and earnings stream. Otherwise it would not have.

Q Was that a plus or minus factor in your mind as an

analyst?

A Oh, plus.

Q Now, let me ask you to turn to the fourth page from the back, the top line, can you read that line?

A It says, "Restate S.O.L.R., cost 25 to 30 cents per," and there is a question mark above it.

Q What does that mean?

A That if they restated for the sale of lease rights, it would cost 25 to 30 cents per share. And the question mark means that it wasn't sure they were going to restate it.

THE COURT: Did this mean to you that the earnings would be reduced or that the book value of the shares would be reduced or what are we talking about?

THE WITNESS: Earnings per share, 25 to 30 cents earnings per share.

THE COURT: For what period?

THE WITNESS: For that year.

THE COURT: All right.

Q When you say that year, is that a restatement of the prior fiscal year or the fiscal year they had just shortened?

A I don't remember.

Q Now, does the question mark relate directly to 25 to 30 cents underneath it or to the whole line?

A To the whole line.

Q In other words, they didn't tell you at that time they were going to restate anything?

A They brought the subject up. They didn't say they were going to do it. The question mark would have put there, not referring to anything but the question of whether they were going to do it.

Q Suppose Mohawk had said at that meeting, we are going to restate our fiscal year ending July 30, 1970, to take account of a change in the method of accounting for these sales to nonaffiliated third party lessors, or as you call it sale of lease rights. What would that have meant to you as an analyst?

A If they decided not to report earnings derived from the sale of lease rights, the impact would have been negligible or nonexistent. The quality, the viewed quality of those earning at that time had come into such disrepute that they were just considered essentially valueless.

Q Would it be fair to state then, just to sum up your testimony, that neither the change in the fiscal year or assuming an announcement in change of method of accounting and or a restatement, would not have changed your opinion as to Mohawk as an analyst?

MR. DEVINE: Objection, your Honor.

THE COURT: He can answer that.

A The one exception would be that if they changed the accounting such that the equipment that had been sold in the past was now reported on an operating basis and those revenues and the gross profit based on those revenues now came into the revenue and earnings stream of the company, it would be beneficial and, hence, a positive.

Q If anything, it would have changed your opinion to the plus side?

A Yes.

MR. UNGER: No further questions of the witness, your Honor.

CROSS EXAMINATION

BY MR. DEVINE:

Q Mr. Eaton, when you returned from the security analysts' meeting, did you prepare a report of any kind?

A No.

Q Did you make any memorandum of the meeting?

A I don't remember doing it and looking through my files I have found none.

Q Who was it that directed you to go to that meeting?

A Well, no one directed me to go to it. I presume I was issued an invitation along with other security analysts

and did go.

Q Who on behalf of your firm authorized that you go to that meeting?

A No one.

Q Did you have any obligation when you came back to report on what you heard?

A Not at all.

Q And you didn't make any report?

A No.

Q Did you make any oral report?

A I have no remembrance of making any oral report.

Q Did you say anything to anyone in your firm about what you had heard?

A I don't remember.

Q Did anyone in your firm ask you what you had heard?

A I don't remember.

Q On May 5th did you see a Wall Street Journal article about Mohawk?

A I don't remember.

Q You don't even remember seeing the article?

A No.

Q Was there a copy of the article in your file when you looked back over your file?

A No.

Q There was not?

A No.

Q Were you following Mohawk at that time?

A Yes.

Q Did anyone at your firm on May 5th or if the Wall Street Journal had an article about Mohawk, ask you if you had read that article?

A I told you, I don't remember. I don't spend my time remembering what people say to me three or four years ago.

THE COURT: Don't apologize. Just tell him truthful answers.

Q However, you do recall that the question mark, which appears to be on the sixth page of your notes, applies to the whole line and not just to the numbers at the end of the line, you do recall that?

A It is not a matter of recall. It would be a question of how I take my notes.

Q Well, is the position of that question mark insignificant?

A No. If I were questioning the cents per share amount and if it were approximately I would have used a squiggly equal sign, an approximate sign.

Q Well, those figures were certainly approximate, weren't they, 25, 30 cents. Isn't that an approximate figure?

A If someone said it would cost about 25 cents a share it would have been a squiggle. If they would have given a range it would have put the range.

Q Who gave this figure?

A I have no idea.

Q Was it either Mr. Wells or Mr. Rifenburg?

A I have no idea.

Q Did anyone else speak at that meeting?

A Yes.

Q Who else spoke?

A The only other person I remember speaking is someone like the product manager or the general manager of the King of Prussia plant, et cetera, who spoke about some of the products that were over on the left-hand side as you faced the front table.

Q Did he speak about S.O.L.R.?

A Who?

Q The product manager.

A I presume not but I don't remember.

Q You said in your testimony that certain earnings figures were so much in disrepute at that time and I didn't completely understand what you were talking about. Would you

enlarge on that, please?

A There was in the late 60's an accepted method of accounting in which one sold -- if you had some equipment that a company might produce or did produce, then went out to a customer, sold the customer and the customer signed a lease of some duration, in which the customer agreed to pay someone so much per month to rent the equipment and presumably also to service the equipment, one could then take as a means of financing that equipment with that lease to a third party independentless or who would, in turn, buy the equipment with an attached lease and possibly with some agreement that the company who was selling him the equipment, would agree to remarket it, service it, et cetera. Under that accounting one could treat that sale, as a sale as far as revenues were concerned.

The problem was that it was considered lower quality revenues and earnings resulting from it than if the company merely reported the rental revenues as they were received even though they were given to a third party other than the company. Because the sales revenues are much more volatile. The customer may or may not -- once future business, depending on economic periods, cycles, et cetera, the shipments and placements of products may be greater or lesser and hence it has a volatility in the revenues and, hence, earnings.

Rental revenues tend to be very stable. You build up a base of equipment on lease and year by year you add to that base. So the volatility is only relatively small on top of the installed base.

Q Would that be true if the leases were cancellable at will?

A Yes, because, again, presumably in any one year all of your customers are not going to cancel all their leases.

Q Did you know in 1970 and 1971 what percentage of Mohawk's equipment was coming back from lease, what percentage of the leases were being terminated?

A I doubt that I knew it. I certainly don't remember.

Q In Mohawk's fiscal 1970 and 1971, how much in evaluating that company did you discount the earnings because of the disrepute of this accounting method?

A On a vague recollection, as I remember sort of the standard number was sort of a nickel or quarter.

Q You would discount them a nickel a quarter?

A As I remember, yes.

THE COURT: Mohawk only or anybody who was doing this?

THE WITNESS: Anybody. The typical way people talked about it, I talked about it, would say so much earnings is coming from the sale of lease rights or sale to third party

lessors, subtract that from the earnings and say the real earnings are this. It is selling at "X" times that.

THE COURT: Didn't these fellows who kept that form of accounting maintain some reserve for their obligations to make good if the tenant defaulted? Didn't they have to carry a reserve in their bookkeeping, or don't you know?

THE WITNESS: To the best of my knowledge, it wasn't a general practice or at least there wasn't substantial reserves that were clearly indicated on financial statements.

Q Did you discount a nickel a quarter for all companies regardless of how much their earnings were or was it a percentage?

A Oh, no. As I remember that was about what the amount came to in the case of Mohawk, in their earnings. So you just subtracted the earnings that could reasonably be related to the sales of lease rights.

Q Did you ever see a note in any of Mohawk's financial statements that suggested that the earnings should be discounted in this way?

A No.

Q Did you ever see a note in the financials of any computer company which suggested that the earnings figures should be discounted in a similar way?

A No.

Q This was something you knew from your following that industry. Is that correct?

A It was the general -- a largely followed practice to do so. I did know the nature and the volatility of those kinds of earnings relative to the stability of earnings that result from a rental base, that I knew.

THE COURT: Well, the net effect of this adjustment you were making was that Mohawk stock was selling at a higher price earnings ratio than a annualized period from its stated earnings. Isn't that so, because you were cutting the stated earnings by five cents?

THE WITNESS: If that's the right number, yes.

THE COURT: Didn't you tell us five cents?

THE WITNESS: As I remember, that number is in the back of my mind.

THE COURT: So it would be twenty cents?

THE WITNESS: For a year, I presume.

Q Would you look at the first page of your notes, please, which are Defendants' Exhibit AA. Halfway down the page I can read the words "April 30th fiscal year." And then there are three lines headed by dashes following that, which I have some difficulty with and I would like you to translate those three lines for the record, if you will, please.

A Okay. The first is "Establish reserve for 1100's." The second, which includes whatever you call repeats, "Establ reserve for sold leases and sale of leases."

Q What does the note you just read, "Establish reserve for sold leases," refresh your recollection about, if anything?

A It doesn't refresh my recollection at all. I can presume what it must have meant but I don't remember at all.

Q Do you recall who said something which led you to make this note?

A No.

Q The phrase "Sold leases," I take it that's S.O.L.R. Is that synonymous with your caption S.O.L.R.?

A Yes, they would stop the practice of sale of lease rights.

Q Now, on the third page of your notes you translated a portion of that page which begins "End S.O.L.R." Would you translate the margin notes on that page, please, and also the full margin note which is directly below the one you translated earlier?

A Okay. First in the margin is margin notes referring to the section above, "Plug to plug tape drivers." It refers to an IBM drive being $500 a month. On a one-year lease the Mohawk cashable would be 330 a month. The nearest competitor

or a little less, the amount of the reserve?

A Well, the question, of course, I presume is 100 percent of what? 100 percent of the equipment now off lease, coming off lease, the total book value of the product.

Q You are faster than I am. All I am asking you at this point is: does the hundred percent relate to the word "reserve"? In other words, was it reserved to be a hundred percent of something?

A Yes.

Q Okay. And do I understand your previous answer to be that you are not sure what it was a hundred precent of?

A Right.

Q But it was going to be a hundred percent of something

A Or a little less.

Q Or a little less.

THE COURT: Do I understand that you function as an analyst is to ascertain if the market price has postured a particular issue in an overpriced or an underpriced condition, is that what you are supposed to be doing? With respect hawk stock, what were you going down there to do?

THE WITNESS: That would be true with the possible atement that while a stock might be fairly e current situation, my job is also to try to there would be a change in the cost situation

such that the stock in the future, while currently reasonably priced, might at that point in time at the current price be overpriced or underpriced.

THE COURT: It means looking forward to going up or looking forward to going down?

THE WITNESS: That's right.

Q When you returned from this meeting, do I correctly understand your testimony to be that you did not tell anyone about Mohawk or at least you don't recall telling anyone anything about Mohawk and you don't recall being asked any questions about Mohawk or its market value or its prospects or anything of that kind?

A I don't recall anyone asking any of those kinds of questions. Undoubtedly they did but I don't recall any.

Q I take it you don't recall your answers to those questions?

A No.

MR. DEVINE: No further questions.

THE COURT: Did you learn anything in the course of your visit to King of Prussia which in your judgment would lead you to believe that the future prospects of this stock were either better or worse than you had believed them to be before you went down there?

THE WITNESS: The only thing I can remember following

that meeting, in particular thinking about -- let me come back. I am going to have to answer one of the earlier questions do I remember talking to someone, because this is what I am talking about. Talking with Ron Hengen in a car driving back from King of Prussia, talking about if the equipment had been sold in the past and the rental revenues generated by that equipment were brought into the revenue stream in the future, how much that might generate in gross profit. In other words, the revenues less the depreciation and service costs, and what that might mean to earnings. That's the only thing about that meeting I came away knowing what I thought was of significance enough that I remember now talking about.

THE COURT: All right.

THE WITNESS: That is one person I do remember talking about it.

THE COURT: If anyone wants to ask further they may in view of this witness' last statement.

MR.UNGER: No redirect.

MR. DEVINE: No further cross.

THE COURT: You are excused.

(Witness Excused)

THE COURT: The Court will take a ten-minute recess.

(Recess)

(In open court)

MR. UNGER: Your Honor, this witness was sworn on the plaintiff's case.

R O N A L D H E N G E N, recalled as a witness by the Defendants, having previously been sworn, testified further as follows:

THE COURT: You are reminded that you are still under oath.

DIRECT EXAMINATION

BY MR. UNGER:

Q Mr. Hengen, were you responsible for setting up the May 4th security analysts' meeting?

A Yes.

Q How did that meeting come to be set on that date?

A Mohawk has a policy of having analysts' meetings after the close of every quarter. I went to Mr. Wells reminding him sometime in January that we had not had a meeting in at least three months and that I had been receiving phone calls from analysts asking when the next meeting was going to take place, and Mr. Wells said he would at the next opportunity would discuss this with Mr. Rifenburg.

Mr. Rifenburg's response to a meeting in February, late February or early March was that he was just too busy, there were too many things on his agenda, and in addition he

didn't know what he could say because of, I think at that time, an impending registration statement on the Atron deal.

So he said that we will skip this one and we will do it the next time after we have a good sense of what the April figures might be, which would be then in May.

Q How did you come to pick the May 4th date?

A Again, in April, early April I reminded him again that we should plan, and since it takes me at least two weeks to get invitations out and to communicate our intention with analysts, in April we sat down again and we fixed the date early May, at which point I went to my list of analysts who had asked for such a meeting and got an idea of when in that first week of May we might be able to get a mutually agreeable date.

I went back to Mr. Wells and said how about May 4th. We confirmed that with Mr. Rifenburg and that was the date we selected.

Q When you referred to registration statement, are you referring to an Atron registration statement or the Atron proxy statement?

A I think the Atron proxy statement.

Q You were present at that May 4th meeting, weren't you?

A Yes.

Q About how many analysts were there?

A I would say slightly in excess of 100 analysts at King of Prussia.

Q Now, when you had these conversations in mid April about setting up the meeting, was anything said to you as to whether or not Mohawk would be announcing any changes in its method of accounting for third party sales?

A In my conversations with Wayne or Mr. Rifenburg in April?

Q Right, in that mid April period.

A No.

MR. UNGER: No further questions of the witness, your Honor.

MR. DEVINE: I have no questions of this witness.

THE COURT: You are excused, Mr. Hengen.

(Witness Excused)

MR.UNGER: Mr. Stoutenburgh.

J O S E P H S. S T O U T E N B U R G H, recalled as a witness by the Defendants, having previously been sworn, testified further as follows:

THE COURT: You are reminded that you remain under oath from before.

DIRECT EXAMINATION

* * *

* * *

and attends he is present. So I will take him as present if the minutes show he is present, in the absence of rebuttal testimony showing he was not there as to any specific meeting that is already in evidence.

MR. DEVINE: All right, your Honor.

THE COURT: A man can always contradict the minutes if he can show by testimony or by evidence that he was somewhere else.

xxx (Defendants' Exhibit V is received in evidence.)

Q From early April, 1971, through April 30, 1971, had anything come to your attention which would have led you to believe that there was going to be opposition to the merger between Atron and Mohawk or Mohawk subsidiary?

A Nothing whatsoever.

Q Now, I believe you testified as to a call that came in on January 29, 1971, from some people at Ladenberg to you. Is that correct?

A That's correct.

Q Did you have any subsequent telephone conversations with Ladenberg respecting the merger or the merger ratio?

A At least two in the month of February.

Q And what was the substance of those conversations?

A The substance of them was always the same. They felt that the ratio should be improved in favor of the Atron

shareholders.

THE COURT: Did they give you a reason for this belief on their part?

THE WITNESS: No, sir, they gave no reason for it.

THE COURT: Didn't you ask them?

THE WITNESS: To me it was self-evident, sir. I didn't bother asking them. I did respond to them though.

THE COURT: They were criticizing your work in effect.

THE WITNESS: Yes, they were.

THE COURT: You didn't ask them what was wrong with the price?

THE WITNESS: No.

THE COURT: Tell us what the response was.

THE WITNESS: My response was that we had considered the factors involved very carefully and that we felt that this was a fair exchange and that I had no reasonable basis to go back to the management of Mohawk to renegotiate any change in that agreement.

Q. Now, did there come a time in any of these conversations where you said to them, why don't you call Mr. Rifenburg or call Mohawk?

A The last conversation that I had with Mr. Erpf of

Ladenberg-Thalman --

THE COURT: Mr. who?

THE WITNESS: Erpf, E-R-P-F.

Mr. Erpf stated to me, "I feel I must take this up with Mr. Rifenburg."

And my response to that was, "I understand your feelings are strong and I invite you to do so."

THE COURT: And he never told you why he thought the ratio was wrong or how much he thought the ratio should be?

THE WITNESS: He never stated what he felt the ratio should be. He just felt it should be more to the advantage of the Atron shareholders.

THE COURT: Did he tell you how much more?

THE WITNESS: No, sir, he did not.

Q Did there subsequently come a time when you had a conversation with Mr. Rifenburg about Ladenberg-Thalman or their complaint about the merger ratio?

A I don't recall a specific conversation. Mr. Rifenburg was aware that Ladenberg-Thalman was upset about the ratio because he was in the office when the first call was made.

THE COURT: How many shares of Atron did Ladenberg, in your view, control or represent?

THE WITNESS: I really didn't know how many they did, sir. They were the underwriter and they did have a big syndicate. I will say they were at least fifteen or eighteen firms on the syndicate, so I didn't really have a feel as to how much they personally controlled or they as a firm controlled.

Q Did you ever have a conversation with Mr. Rifenburg respecting whether or not Ladenberg was going to oppose the merger?

A I indicated at some time in that same time frame to Mr. Rifenburg that he might get such a call.

Q What time frame was this?

A Late February, early March.

Q Of 1971?

A Of 1971, yes, sir.

Q And did Mr. Rifenburg subsequently tell you whether or not he had a conversation with Ladenberg?

A He did not state to me that he had conversations with Ladenberg. He did indicate to me in late March that you don't have to worry about opposition at all by Ladenberg-Thalman.

Q Now, did there come a time when you had a meeting with somebody from Morgan Guarantee Trust Company?

A Yes.

Q Who was that?

A A Mr. Steve Laird, L-A-I-R-D.

Q And when was that meeting?

A I am not sure of the date but it was March, April time frame, I believe.

Q I show you Defendants' Exhibit R for identification and ask you if that refreshes your recollection as to when you had that meeting with Mr. Laird.

A Yes. His letter to me states, "Thank you again for the meeting" --

THE COURT: Don't read the letter.

Q Does reading that letter refresh your recollection independently as to when you had that meeting?

A Yes.

Q When was it that you had the meeting with Mr. Laird?

A February 26th.

Q Of 1971?

A Of 1971.

Q Did you subsequently receive that letter?

A Yes, I did.

Q From Mr. Laird?

A Yes.

MR. UNGER: I would ask the letter be marked in

evidence, your Honor.

MR. DEVINE: I object, your Honor. The contents of the letter are irrelevant.

THE COURT: Well, perhaps you ought to state for the record the purpose of the offer.

MR. UNGER: The defendants claim that there was no conversation with Mr. Le Landais April of 1971, on the theory that if they had sufficient votes, and it's in the record that this was 40,000 shares alone, Morgan's, there would have been no reason to make that phone call.

THE COURT: Well, I will take it for the limited purpose of showing that on March 10, 1971, defendants understood that Morgan would vote favorably for the merger. I think it is admissible on that score. Objection is overruled.

MR. DEVINE: Your Honor, the proxies are irrevocable until the date of the meeting. They didn't even have a proxy.

THE COURT: That is an argument. Objection is overruled.

xx (Defendants' Exhibit R received in evidence.)

A Mr. Stoutenburgh, was anybody else present at your meeting with Mr. Laird?

THE COURT: No more about Mr. Laird unless you have one of these plaintiffs present.

Who else was present?

THE WITNESS: No one else was present. It was in my office.

THE COURT: Let's go on to something else.

Q Between the date of that letter, which I think is March 10, 1971, and through and including April 19, 1971, did you have any further conversations with anybody from Morgan Guarantee Trust Company with respect to the merger?

A No.

Q Now, I am going to show you the list of Atron private placement holders which is contained in the pretrial order, holders at April 30, 1971, and also at the issued date as indicated on the offerings. I ask you to go through this list and tell me whether by April 19, 1971, you had any expectation with respect to each one of these or of their being for or against the merger or having no opinion at all, as to only those you would know about or had an expectation with respect to. Let us start with its founders' shares.

A Mr. Wesley Anderson, my expectation was that he would vote for the merger.

Q Who is Mr. Anderson?

A Mr. Anderson helped the company. He was an investment banker --

THE COURT: Let's cut this short. Let's have him give his expectation. Don't we have the actual record vote in

evidence here?

MR. UNGER: This goes to the same point.

THE COURT: I am not going to listen to a whole story as to who Mr. Anderson was.

Is there anybody in that list of founders in the pretrial order whom you had reason to believe might vote negatively?

THE WITNESS: Founders, none, with the exception of Mr. D. Bruce Stewart and he didn't have any shares.

Q Now, let's go to B, Mohaw.

A No question with regard to Mohawk.

Q Go to C, think of those where you had an expectation that they would vote against, for or had no expectation at all.

A Well, there were none in the first private placement that I would expect to oppose the merger.

THE COURT: He is asking for your state of mind on April 19th.

THE WITNESS: That's right, sir.

THE COURT: All right.

Q Let's look at the second placement with respect to those same points.

A I would have no reason to believe that any of the second private placement would vote against the merger.

Q And did you expect they would vote, any of these would vote for the merger on April 19th or did you not have any expectation withany of them?

A I obviously expected the Mohawk Pension Fund Trust to and the Morgan Guarantee for sure. I had no reason to believe the others would not.

Q Now, with respect to your conversation with Mr. Rifenberg where you said something about don't worry about Ladenberg, did you have any expectation with respect to Ladenberg's vote on April 19, 1971?

A No, I didnot.

THE COURT: Hand up Defendants' Exhibit C for identification, please.

Q Did you expect Ladenberg to go against the merger by April 19, 1971?

A No.

Q Did you expect them to be for the merger by April 19, 1971?

A I expected them to support it, yes.

THE COURT: Isn't there a record in this case of who voted no?

MR. UNGER: Yes, your Honor. The proxies themselves are in evidence and there is also a vote record. It's in evidence or will be marked during the course of this examination.

Q Now, did you personally contact any private placement holders, any Atron private placement holders with respect to whether or not they were going to vote for the merger?

A Not with respect to whether they were going to vote for or not, but to insure that they did get their votes in. If they had any questions about the reason for doing so, I answered them.

Q Who did you contact?

A Specifically Mr. Roundhorse.

Q Did Mr. Roundhorse, when you spoke with him -- withdraw that.

You spoke with him on the phone or person to person?

A On the phone.

Q Was that before or after April 19th?

A I talked to him about April 19th.

Q Did Mr. Roundhorse ask you whether or not he was going to get free Mohawk stock on the merger?

A No, sir. He understood he had a purchase agreement with regard to the stock.

MR. DEVINE: I move that be stricken.

THE COURT: Strike out everything after "No."

Q Now, Mr. Stoutenburgh, were your expectations with respect to the votes, the expectations you just testified to,

were they fulfilled on April 30, 1971?

A Yes, they were.

Q I show you Defendants' Exhibit C in evidence and ask you if you have seen this document before.

A Yes, I have.

Q Is that the record of the vote at the shareholders' meeting on April 30th?

A Yes. I have seen that.

(Pause)

Q I show you Defendants' Exhibit X for identification, which is a series of letters starting with the date of April 21, 1971, headed "First Trust Company of St. Paul." Who was the First Trust Company of St. Paul?

A First Trust Company of St. Paul was our operating bank. It was also our transfer agent in Minneapolis.

Q Were they receiving the proxies?

A Yes.

Q Did you receive those letters on or about the dates of the letters themselves?

A Yes.

MR. UNGER: I would ask those be marked in evidence.

MR. DEVINE: Your Honor, I object. This, again, is totally irrelevant what the proxies said on that week in April. That has nothing to do with how these people could or

would vote on April 30th because these were revocable proxies, and it says nothing about the witness' state of mind on April 19th because all the letters are dated after that time.

THE COURT: Well, we have already taken the total vote, haven't we? And the real question here is who voted no, if any of these people voted no that might be relevant. We have some one percent who voted no, as I understand.

MR. UNGER: Your Honor, it has been stipulated that all the plaintiffs voted for the merger except ITNR who did not vote.

THE COURT: I don't see any need to take "X" then. I don't see any relevance in Exhibit X.

MR. UNGER: The point is to substantiate, because of the relative closeness in time, to substantiate the witness' expectations on April 19th.

THE COURT: Well, the top letter, for example, is marked "Received April 22nd."

MR. UNGER: I think that is the first one.

THE COURT: Well, I will take them for what they are worth. The objection is overruled.

xxx (Defendants' Exhibit X received in evidence.)

Q Now, Mr. Stoutenburgh, I show you Defendants' Exhibit M for identification and ask you what those documents are.

A These are the original telephone bills for all the numbers installed at our facilities at Atron Corporation for --

Q Does that cover the period April 19, 1971?

THE COURT: What is the question?

MR. UNGER: Whether that covers the period April 19, 1971.

THE COURT: Hasn't that been stipulated to in the pretrial order?

MR. UNGER: Not on the telephone, your Honor.

THE COURT: It is marked "X", isn't it?

MR. UNGER: It is marked for authenticity but not for admissibility.

THE COURT: Marked authentic. Don't waste time with this.

A Yes, it does cover that period.

Q You are familiar with Merkin and Company's telephone number at that time?

A Yes. I have recalled since the deposition.

Q What is that telephone?

A (212), area code, 425-5500.

Q And those records are kept by Atron when they received them by the telephone company in the regular course of business?

THE COURT: Authenticity is conceded. The only question is relevance.

MR. UNGER: I offer them.

THE COURT: Offer to show what?

MR. UNGER: To show he didn't make the telephone call to Mr. Le Landais on April 19th.

THE COURT: From those numbers?

MR. UNGER: Yes.

Q Where were you on April 19, 1971, during the business day?

A I was in my office on the business day.

THE COURT: Where?

THE WITNESS: In my plant in Minneapolis, sir.

Q Looking at those numbers, does Atron have any other telephone numbers in its plant than the numbers reflected on those telephone bills?

A No. However, with our data processing equipment, that is our terminals, there is a watts line connected to those terminals at the time.

Q Were ordinary telephone calls made on that watts line?

A Not normally. That would interrupt the debugging and checking out the equipment that were connected with on the machines.

Q I show you Defendants' Exhibit J for identification and ask you does that document bear your signature?

A It does.

Q And what is that document?

A My expense report for a trip taken during this period to the New York City area.

MR. UNGER: I ask that be marked in evidence, your Honor.

MR. DEVINE: May I see it a second?

(Pause)

MR. DEVINE: I have no objection, your Honor.

THE COURT: All right, it will be received in evidence.

xxx (Defendants' Exhibit J received in evidence.)

Q I show you a book which is headed "Month at a Glance, 1971," and ask you what that is.

THE COURT: Mark it for identification.

xxx (Defendant's Exhibit AD marked for identification.)

A It is my -- the book I keep on my desk as a calendar in which I mark things that are coming up or to be brought to my attention during the day.

Q Turn to the date of February 17, 1971, and read -- is that your writing underneath that date there?

A Yes.

Q Read that, please.

A It says, "Saturday early, E.D.P.R., Morgan." Underneath that it says, "New York City, Pierre."

Q Was that writing, "New York City, Pierre," put in that book by you prior to February 17, 1971?

A Oh, yes.

Q I would ask you to turn to the month of April, particularly the date of April 19, 1971. Would you read in what you have written? Is that your writing under that date there?

A Yes.

Q Would you read that in?

A "0900, staff meeting, MDS, Com. Hdw.," which means communications hardware. "P.A.N.E.T.," which related to the control panel of a processor.

Q Does that indicate that you spent the day in Atron's offices in Minneapolis?

A Yes. These are the things that were covered during that day or worked on.

MR. UNGER: I would ask that document be marked in evidence.

THE COURT: What he is asking you does the document refresh your recollection that you were, in fact, in Minneapolis doing those things on that day.

THE WITNESS: Yes.

MR. UNGER: I would ask that that document be marked in evidence solely with respect to those two days, your Honor.

MR. DEVINE: I haven't seen this before, your Honor. May I have a second to look at it?

THE COURT: Yes.

MR. DEVINE: Your Honor, I do not dispute the authenticity of Defendants' Exhibit AD as to the two dates, February 17, 1971, and April 19, 1971. However, I do object to the entries on those dates which are irrelevant to the lawsuit. The entry, "N.Y.C., Pierre," on February 17, 1971, is relevant and I have no objection to that entry. As to the entries on April 19th and the other entry on February 17th I see no relevance.

THE COURT: Well, if there is something prejudicial about those entries which I have not seen --

MR. DEVINE: No, there is not.

THE COURT: If they are irrelevant they won't bear any weight. Really all that has to be done is mark it for identification and just refresh his recollection as to where he was. It has been offered and if there is no objection I will take it.

MR. DEVINE: I have no objection.

(Defendants' Exhibit AD received in evidence.)

* * *

xxx

* * *

wouldn't worry about this fellow too much.

CROSS EXAMINATION

BY MR. DEVINE:

Q Mr. Stoutenburgh, do you know if the legend which appears on the Mohawk stock which was issued after April 30, 1971, to former shareholders of Atron who held restricted stock was different from the legend which appeared on their Atron stock?

A I do not recall that, Mr. Devine.

Q Did you ever look at your own certificates to see if the legend was different?

A No, I didn't read it word for word. I sent mine in, got some in return. It had words expressing a legend and I did not examine those words in technical detail.

Q Did you ever consult any attorney with respect to whether the legend on the certificates you got back from Mohawk was more or less stricken subsequent in terms of ability to sell that security than the legend on the Atron certificate which you previously held?

A No, I did not consult an attorney.

Q At the time that the proxy statement was in draft form, did you consider making any suggestion that there be disclosure as to the nature of the legending on the Mohawk stock which was to be received?

A No, I didn't.

Q Or whether it would differ from the legending on the Atron stock?

A No, I didn't ask that question.

Q I think you testified earlier that you do recall being deposed in this action?

A Yes.

Q I would like to read to you a portion of page 97 of the transcript and ask if you recall giving that testimony. Excuse me, it starts on page 96. There is some inquiry here about conversations and there is a question, "With whom?"

"A Mr. Halsey.

"Q When did you discuss that with Mr. Halsey?"

I hope Mr. Unger will stipulate at this point we are talking about restrictions on stock.

MR. UNGER: Certainly.

Q "A Very shortly after the announcement to the agreement to merge.

"Q What did you say and what did he say?

"MR. UNGER: You mean on that subject, Mr. Devine?

"MR. DEVINE: Yes.

"A I told him we made representations that we desire to have the first private and the founders' stock in the exchange made free and that Mohawk desired" --

MR. UNGER: I don't recall anything on direct examination on this subject. I don't think it is a proper subject for cross examination for impeachment of the witness.

THE COURT: Well, without reviewing the entire record, it would be impossible for me to tell whether the question was opened but I think I will permit it.

MR. DEVINE: I can do it in a shorter fashion.

C Mr. Stoutenburgh, did you ever tell Mr. Halsey that you expected, based on your conversations with the Mohawk people, that free stock would be issued to the holders of Atron restricted stock?

A I don't recall the specific conversation but I may have said it to him since I did relate to him the essence of our agreement.

Q When did you retain Mr. Halsey?

A That is the merger agreement, the terms, four to one, and the attitude of the company. I may have included that but I am not sure.

Q When did you on behalf of Atron retain Mr. Halsey to make sure the --

A In the early part of April.

Q Of 1971?

A 1971, yes.

Q Do you recall at any time in February of 1971 visiting

the offices of Merkin and Co. on a day when Mr. Halsey was present and not saying hello to him?

A I may have. I was pretty busy. Usually I would go say, "Hi, John," but there were occasions when I had many other things to do and I could have gone into Merkin and not said hello to him.

Q On February 17th when you went into Merkin, did you go in specifically to see Pierre?

A Yes.

Q Were there other occasions during February and March of 1971 when you visited Merkin and Co.?

A I do not believe so, no.

Q At any time between January 29, 1971, and April 30, 1971, were you aware of the possibility that Mohawk could register the stock that it was to issue under the merger?

MR. UNGER: Objection, your Honor. That is a speculation. Sure they could register it. I will stipulate to that.

THE COURT: The question really directs itself to his state of mind.

MR. DEVINE: Yes.

THE COURT: Hasn't this been asked of the witness before?

MR. DEVINE: I think it has not been.

THE COURT: Can't you answer it yes or no?

THE WITNESS: I really don't know. I don't know what Mohawk could or could not do.

Q Did you have any discussions with Mohawk as to whether or not they would register the stock in connection with the merger?

A No, sir. All I could tell you -- oh, in connection with the merger?

Q Yes.

A No, I didn't have any discussions in that regard.

Q During 1971, before April 30, 1971, what percentage of Atron's outstanding stock was restricted as to transfer, approximately?

THE COURT: Can't that be figured out from the pretrial order?

MR. DEVINE: I think the answer is yes, your Honor. I am not sure.

THE COURT: Can it be stipulated?

MR. DEVINE: I will take a stipulation.

MR. UNGER: The figures are in there of the total outstanding and the numbers are on the restricted stock.

THE COURT: All of the first and second placement and the founders' shares were restricted as of April 19th, isn't that so?

MR. UNGER: A few others in option. I don't think

any significant.

MR. DEVINE: Mohawk stock was also restricted.

THE WITNESS: Yes. It is a private placement.

THE COURT: But Mohawk is listed under the first and second placement, is it not?

MR. DEVINE: In the pretrial order you will find them listed separately, but there is no dispute.

THE COURT: All right.

Q Prior to April 30, 1971, did you know that different groups of Atron shareholders who held restricted stock had different registration rights?

A Yes, I knew there was a shade of difference. Yes.

Q And do you know how many different groups there were in that respect, how many different shades there were?

A I can only recall two. The reason why I recall two is that I was responsible in the second private placement of bringing Morgan Guarantee in. Morgan's people, who had the majority of that, asked for a slightly different rights for registration than was contained in the first private placement. I do not recall the details of that difference.

Q Did you consider prior to April 30, 1971, whether any of the shareholder groups having registration rights, had a right to have the Mohawk stock they were to get on the merger registered at the time of the merger?

A Repeat the first part of that question, please.

MR. DEVINE: Read the question.

THE COURT: Read the question back.

(Record read)

A No, I did not.

Q Did you consider what effect the merger would have on the registration rights of the various groups?

A To the best of my knowledge the registration rights remained unchanged unless it could be found by counsel for Mohawk that they could change that upon the effect of the merger, but I did not know. That was something for their counsel to find out.

Q Do I understand your testimony to be that you thought the registration rights carried over as a right against MDS-Atron?

A I would assume that they would since MDS was taking on all of the obligations of MDS-Atron. That would be my opinion, yes.

Q You understood that as part of the merger, Mohawk, the parent, was going to take on all of the obligations of the subsidiary?

A Yes.

Q That was your understanding?

A Yes.

Q At any time prior to April 30, 1971, did you consider reciting or suggesting that it be recited in the proxy statement that the effect of the merger on registration rights be described?

A No, I didn't think about that.

Q Did you consider whether the agreement of merger should be included in the proxy statement in toto?

A Yes, I did, because I believe -- I recall one of the comments on original submission to the Securities and Exchange Commission asked us to consider doing that. I have forgotten what the reply of counsel was to that. But, in any event, it was satisfactorily resolved between the division of the Securities Exchange Commission and counsel for Atron.

Q Were you a party to any discussions involving the decision whether or not to include the agreement in full on the proxy statement?

A No, sir. I left that to counsel.

MR. DEVINE: I have no further questions, your Honor.

MR. UNGER: Just one question.

REDIRECT EXAMINATION

BY MR. UNGER:

Q Was Mr. Halsey paid by Atron in connection with his retention to make sure that votes were put in by Atron share-

holders?

A Yes, he was, sir.

C How much was he paid?

THE COURT: What possible difference does that make? I have been puzzled by this all along. It was suggested to me in the beginning that he was doing it on Merkin's time, that this was in some way a derrogation of Merkin rights.

I will let you make a complete record but I don't see any point in it.

How much?

THE WITNESS: $1500, sir.

MR. UNGER: No further questions.

MR. DEVINE: No further cross, your Honor.

THE COURT: You are excused.

(Witness Excused)

MR. UNGER: I don't know what your Honor's schedule is. My next witness I expect will take more than fifteen minutes.

THE COURT: Put him on and let's get going.

R I C H A R D P. R I F E N B U R G, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UNGER:

Q By whom are you employed?

A I am employed by Mohawk Data Sciences Corporation, president, chief executive officer.

Q You have been employed by them since approximately 1964?

A Yes.

Q What was your position with Mohawk Data Sciences Corporation in 1970 through 1971?

A I was executive vice president in 1970 until June of 1970. I was elected president in June of 1970 and from that period forward I have held this office.

Q Did there come a time when Atron Corporation came to your attention?

A Yes, Atron Corporation came to my attention on the founding of Atron I believe in November, 1968.

Q Now, did Mohawk at about that time form any relationship with Atron Corporation?

THE COURT: Is this in dispute?

MR.UNGER: I think some of these preliminary facts are not yet stipulated.

THE COURT: It is all in the pretrial order and the Court has heard it again and again. Let's get down to cases. Let's get right down to the facts in issue.

Q Did there come a time when Mohawk and Atron agreed to a merger or had an agreement in principle to merge?

A Yes, it was in the latter part of January, 1971.

Q Was that a meeting?

A meeting with Mr. Stoutenburgh and associates, Mr. Wells and myself.

Q How did that meeting come about?

A In September of 1970, the prior September, MDS did a rather complete product review as to what its long-term future development plans and product plans would be. At that time we were buying from Atron a product known as the Atron 501, which was inserted as a programmable computer component, within a printer system we had developed, jointly developed and were marketing.

In September we made the corporate decision, and this was the latter part of September, to go forward with what is now known as our system 2400. This was committing almost the whole corporate resources into changing the corporate direction from one of, if you will, a unit or peripheral company, into one of a systems company.

The decision was then entered into, since we were going to be a systems company and did indeed need a programmable processor unit within the system of the many peripheral devices we provided, that we had to select a system. We had at that

time committed, and this is an approximate number, we had purchased from Atron approximately 400, perhaps more, of the Atron 501 processor, which was used in the center of an earlier system. We examined the Atron processor. We examined a number of others available on the market at the same time. We felt that the long-term commitment, since we had built a background in our field organization with the Atron unit, we felt that on a go-forward basis, that the component purchased from Atron, this small processor would be in the best interests of MDS to go forward with.

Our equipment is basically rental equipment. As such, we invest many millions of dollars in the hardware to produce it and then we have to keep it out on rent for rather lengthy periods of time, always looking for five or eight years. Since the system was a programmable systems versus previously hardware systems, the programming support or sometimes referred to as software support, that we would go forward with was every bit as expensive and costly as the hardware. And we must provide the support to our customers for that lengthy period of time.

We also have an obligation, since we put this equipment on rent and must maintain it for many, many years thereafter and support it, that we have both the engineering capability and the software capability within our company to

insure that this long-term support is available to our customers.

Consequently, when a decision was made shortly after September, probably in November, that the Atron 501 processor would be the core of the machine, I suggested to Mr. Stoutenburgh that he and his associates come out and talk to Mr. Wells and I about various corporate matters and relationships. My intent was, and I indeed did at the meeting, serve notice on Atron that, number one, MDS was committing itself and its long-term futures, to the system 2400. Two, that we would use the Atron 501 processor as the internal unit inside of it. Three, that we had manufacturing rights to this unit. We had purchased a minimum quantity of the contract that required, and consequently since we needed the long-term engineering software and manufacturing integrities of this product for our long-term exposure to our customers, liabilities, and so forth, that we indeed would manufacture the Atron 501 processor and assume our rights.

I suggested to Mr. Stoutenburgh that he look at his position, that this period of time was 1970. Actually it was January, 1971, we were in the middle of an economic recession in the United States, particularly harmful to the data processing industry. I called his attention to the fact that we were his 90 percent customer, that the resources of the

Atron Company were approximately four million dollars, that on a go-forward program MDS would, and indeed has since, spent in excess of forty million dollars a year on the system in inventory alone on the system now known as the 2400 system. In addition to that the continuation of the software design, the engineering, and the marketing program of training all of our field program, both domestic and overseas, is another ten, fifteen million dollars expenditure every year. These are the kind of exposures he would see going forward as a company. MDS would not be able to help him because we must develop these abilities in our own corporation.

I suggested to Stoutenburgh that Atron consider joining us because we were his 90 percent customer. Number two, he did not have the final resources and because of the recession he did not have the domestic ability to market very well, and the overseas market, which we had developed to some extent by this time, was not available to him. So we suggested that he come with us because his financial resources were not strong enough to go forward without the support of a larger company such as ours.

Q When did you tell him all this?

A January 29th I believe was the meeting day, 1971.

Q Was there any discussion at that meeting with respect

to whether or not Mohawk would issue free stock to Atron private placement holders on the merger?

A During the negotiating period on January 29th, we suggested they come with us, they caucused and they came back and we started talking that it was probably an attractive idea. Now for what kind of ratio of price? We concluded what we finally worked out as a favorable ratio for both parties. Then Mr. Stoutenburgh asked me what will the position of the various insiders be in relationship to the free stock. I recall my answer to him was that since the form the merger would have to take would be a pooling of interests, and consequently to protect the pooling of interests we had to insure that the existing management of the company continued. I beieve that is a legal requirement, that the insiders, meaning the founders, would have restrictions on their stock with no question, because we had to protect the integrity of the pooling of interests, that the public stockholders, because we had just completed a number of other mergers with public companies, the public stockholders would come in as public stockholders. The in-between group we admitted that this was a technical problem involving S.E.C. law and I couldn't answer him. I told him that as far as MDS from a corporate policy was concerned, we would like all stockholders to be free stockholders, if you will, or have registered stock.

But this was dependent upon our lawyer, our lawyer's judgment of whether this stock would be or not. Consequently I couldn't make a statement for these.

I did tell him that if indeed they were not allowed to be free stockholders, that the next possible registration MDS prepared we would allow them to become stockholders.

Q What was the basis of the corporate policy which you referred to with respect to restricted stock?

A The Atron stockholders, particularly the private stockholders, or the investment stockholders, would be a very, very small minimum authority and the administrative detail of keeping track of a small number of investment letter stockholders when we had at that time approximately five million shares outstanding was just an administrative problem that was not worth -- there was no reason we wanted them to be private. It was to our convenience to have them all registered rather than whatever small number they were allowed to have registered. Indeed, we did register at the next registration statement allowing them to enter.

Q You permitted private placement holders to register all their stock, without regard to any language in any agreements that they had had?

A That's correct.

Q Now, in between that meeting and April 30, 1971,

did you have any further conversations with anybody at Atron respecting whether or not the Atron private placement holders, other than the insiders that you referred to, would be getting Mohawk stock free of transfer restrictions?

A No, sir. That was really left to the attorneys.

Q Did you have any discussions with anybody at Mohawk through that period?

A I don't believe so.

Q Did there come a time when you had a meeting with people from Ladenberg-Thalman?

A Yes.

Q When was that?

A Would you say that again?

Q When was that?

A March 18, 1971.

Q And where did that take place?

A That took place in the Mohawk Data offices, 46th Street, New York City.

Q Who was at the meeting?

A Attended by three representatives of Ladenberg-Thalman, Mr. Liebowitz, Mr. Erpf, and Mr. Weiss, Jeffrey Weiss.

Q Who from Mohawk was there?

A Myself.

Q Now, would you tell me what happened at that meeting, who said what to whom? Before that, tell me what was the basis for having this meeting.

A May I go back to January 29th?

Q Yes.

A At this meeting Mr. Stoutenburgh was contacted by or contacted a number of the private stockholders and he indicated to me as the merger went through I might have to talk to a number of these companies or these people as to the reason for the merger and as to the ratio that was established for the merger.

Mr. Liebowitz I knew from some years previously. He had some dealings with MDS in probably 1967, and Bob called me up and said he would like to bring several of his associates over and talk about the merger, the ratio relationship and about MDS's future because the election would be coming up soon and they wanted to clear their own position. Mr. Liebowitz set up a meeting on March 18th.

Q Now, tell me what happened at that meeting, who said what to whom as best you can recall.

A The three of them came to our office, the MDS office in New York, and they specifically felt that the exchange ratio should have been better. Their comment to me was can not MDS improve the situation because they felt that

exchange, the ratio should have been better. I called their attention to the fact that I outlined to Mr. Stoutenburgh earlier, that, number one, Atron only had a total net worth of four million dollars. In the previous year Atron had lost one million dollars on approximately one million dollars of sales. So the cost of doing business was almost two times the business they were doing, that we were their 90 percent customer and we both had the legal right and the intention of removing this product, which meant 90 percent of their on-going business, and that consequently the only value that Atron had to MDS was the inventory or the cash inventory, the liquid assets of four million dollars, that our offer was almost twice that large, and this was, because we wanted this group of programmers and we wanted this group of engineers, we didn't want to go out and develop our own over a period of time to keep the integrity of this product for many years. Consequently we offered almost twice the book value of the company, when really it probably had no value greater than book value but to us it had a time value. Since the announcement had taken place, and I believe that the effective exchange rate at the time of January 29th was somewhat less than eight dollars a share and the book value was somewhere around four dollars a share. These are approximates. And that by the time that they were sitting there talking to me

and the merger took place, it was closer to nine or ten dollars a share.

So not only had we not paid the four million dollars that it was worth or even the eight million dollars that we agreed to but we paid almost ten million dollars because we exchanged -- the purchase price was tied to ratio, not to absolute dollars, perhaps an error on our part. Nevertheless, we had intended to honor our agreement but we certainly paid a very premium price for this company.

Q Was there any response from any of the three gentlemen from Ladenberg?

A They really had not had their attention brought to the fact that at least in our opinion Atron was not a viable company without MDS's relationship. When they left the meeting they gave me an indication they would indeed vote for the merger and I think subsequently they did.

Q Now, are you familiar with the name International Technology and Natural Resources?

THE COURT: Excuse me, just a moment. I would like to go back to Ladenberg. Did these people tell you why they thought the price wasn't enough?

THE WITNESS: One of these three gentlemen, Mr. Weiss, who was, I believe, on the Atron board of directors at the time, felt that the computer industry at that point was

still very exciting in the stock market, and although it had come down somewhat. I think they felt that the attractiveness of this group of people was such that they could be successful. I don't think he addressed himself to the fact that we had both a poor economic time in the United States in our business during that period of time and the fact that they were unsuccessful in marketing this device in that particular market.

THE COURT: This is all he told you on behalf of Ladenberg?

THE WITNESS: Yes.

Ladenberg was the underwriting firm who took --

THE COURT: I understand. I am trying to find out what reasons they gave you.

THE WITNESS: Since this was below the underwriting price, I think he was trying to go back to their stockholders and get the best possible deal he could. I think he was merely trying to raise arguments to raise the price.

Q In your consideration of whether or not to talk merger with Atron, did you consider that Mohawk held Atron private placement stock?

A I am sorry, repeat that, please.

Q At the time you were considering whether or not to talk to Atron with respect to a merger, did you consider the

fact that Mohawk at that time held Atron private placement stock?

A I suppose I considered it.

Q Did that enter into your decision to talk about a merger with Atron?

A We held, roughly speaking, 200,000 shares plus some in our retirement fund, and the value -- the company had a net worth of about four million dollars and we held -- that means the value of our stock was under $200,000. Consequently we are talking about going into a system where we have spent many, many millions of dollars, such a small investment, that it was not important in terms of pushing us in one direction or another. It was important in the sense that those were votes favorable to a merger and we were pleased there were seventeen percent of the stock, or whatever the percentage was, was in favor of it, if you will.

Q Now, after your meeting with Ladenberg, did you speak with Mr. Stoutenburgh about that meeting?

A I believe I called Joe and told him that he didn't have to worry about the Ladenberg people.

Q About when did you make that call?

A Probably the same day or within a day afterwards of the March 18th meeting.

Q Now, prior to April 30, 1971, were you aware as to

whether or not International Technology and Natural Resources was an Atron private placement holder?

A No, I was not aware.

Q When did you first -- were you aware of the existence of International Technology and Resources by that date?

A By which date?

Q I will withdraw that.

A Pardon?

Q I will withdraw it.

THE COURT: April 30th he asked you.

A I wasn't aware.

MR. DEVINE: I object to that question.

THE COURT: Whether he was aware of the company?

MR. DEVINE: Yes. He was Mohawk at that time and he was not Atron and I am sure he wasn't aware of the 70 percent of the outstanding shareholders of Atron.

THE COURT: All right.

Q You were a director of Atron prior?

A Yes.

THE COURT: Prior to merger?

THE WITNESS: Yes.

MR. DEVINE: Wait just a minute.

MR. UNGER: Long prior.

Q You ceased being a director when?

A When I took this job over with Mohawk, I ceased being a director.

Q Now, Mohawk had transactions in which it sold equipment that it owned on lease to third party nonaffiliated lessors in its fiscal year 1970. Is that correct?

A Yes.

Q Now, how was Mohawk reporting those sale transactions for its year 1970?

THE COURT: Excuse me, is this witness going to testify differently than Mr. Wells?

MR. UNGER: I would hope not, your Honor.

THE COURT: I would hope not, too. So let's not get cumulative testimony. If you are willing to accept Mr. Wells' testimony on this as truthful, let's go on to something else. It's merely repetitious. Mr. Wells gets on and tells us about it in 1970. Plaintiff doesn't disagree with him on that score and now you want this man to answer the same questions over and over again. Not necessary. If there is something in issue that he knows about this topic, then let's bring it out.

MR. UNGER: I think there are some points unclear and I will bring that out.

THE COURT: All right.

Q Did there come a time when you had a conversation with Mr. Wells with respect to whether or not Mohawk should change its method of accounting for those kind of transactions

A Yes. There were probably two periods of time. During the period of March, late March and probably April of that year --

Q What year?

A I am sorry, of 1971, Mr. Wells -- MDS domestic marketing organization was receiving a fairly heavy penetration of cancellations of its older equipment in the domestic market. We were more than making it up by taking these units in and putting them out again, but the domestic rental base was under severe economic penetration. The overseas base was going very well. The net result was excellent for the company. Domestically we had gone from a very positive rental every month to where the placements came down to where we were putting out as many as were coming back and we were holding our own in the market, which at that time was also very favorable.

Mr. Wells brought to my attention that, number one, by selling our rental rights we were indeed penetrating our rental base, which is very important to a rental company. Number two, that these kinds of transactions were under certain kinds of accounting questions for the future. I asked him to

go to our auditing firm, Leidesdorf, and find out if our treatment of these transactions was indeed correct and legal and he did so and reported back that yes, indeed they were correct and legal. Although they may not meet the new accounting treatments that were coming forward, at this time we were certainly within the accounting regulations or rules.

Sometime in the latter part of April, Mr. Wells came to me and -- incidentally at the earlier date we made the decision to stop the penetration of the rental base, we would terminate all such sales and we would, in fact, in the future only, in fact, take rentals in this particular type of transaction, the sales of lease rights as the previous witness called it.

Late in April, Mr. Wells came to me and he suggested that since we were not going to continue with this type of third party arrangement, the lease rights of these machines or these machines, that perhaps we should consider reversing our treatment for this particular fiscal year we were in and treating them on the operating method rather than the lease sale method.

Q You are referring to fiscal 1971?

A I am referring to fiscal 1971 now.

Q Now, where did this meeting take place? Was it a meeting or telephone call?

A I suspect this was a meeting in New York City because I remember the conversation. I can see his face. I believe it was in a car, the company car but I am not real sure.

I explained to Mr. Wells that we had just a few weeks earlier verified that indeed, with our certified public accountants, that indeed the method of accounting was correct that we were doing and if we wanted to change this method wouldn't we indeed be incorrect then? He said he didn't think so but he would go back to Leidesdorf and indeed verify the fact that if we did decide to go in the other direction, we would --

Q With reference to April 15, 1971, the middle of April, when did this first conversation with Mr. Wells occur?

A I believe the first conversation on the treatment of the existing was prior to April 15th. I know the second conversation was after April 15th.

Q The second conversation you are just going to tell us about?

A Yes.

Q When with respect to April 15th did the second conversation -- approximately what date in April?

A Probably 24th, 25th, April, in that period of time.

Q Where did this conversation occur?

A This was by telephone.

Q Tell me about the conversation.

A Mr. Wells came back and reported back to me that the accountants -- there were a number of questions we had going on at this particular time.

May I address a larger question here?

THE COURT: Just give the conversation.

THE WITNESS: That ties into the nine-month year, that was all part of the same conversation. I will skip the nine-month situation.

THE COURT: Give us the whole conversation on the phone as best you recall.

THE WITNESS: All right. I had requested Mr. Wells after the March board meeting, we wanted to change our fiscal year to a shorter -- not a shorter fiscal year but a different part of the calendar. It turned out that our July ending fiscal year brought us great operational problems in Europe in trying to close for the vacation period and we had requested for two years to have our fiscal year changed so we wouldn't have these operating problems during vacation. At the March board meeting, I suggested we consider a shorter year. I wanted to put it on a calendar quarter, not a fiscal quarter. The board gave us authority to go ahead and consider such a change. Mr. Wells had indeed been working with

Leidesdorf to change our fiscal year. He reported to me two things as part of this call. One, that it would be impractica to change our fiscal year to anything but a calendar quarter. The second point is that he had received from Leidesdorf the information that we had the option of treating these sale of lease rights either in the operating method or the financia method.

He alerted me that we were having a security analysts' meeting the following week and since we were going to talk about the shorter fiscal year, and indeed now had firmed on a fiscal quarter, not a calendar quarter, we ought to comment on this if we were going to consider doing anything.

I told Mr. Wells that there were two aspects of changing this accounting treatment that bothered me in both ways. One, I like consistency, leaving like it was because in accounting methods as a corporation you try to be as consistent in your accounting methods as much as possible. Even though we were terminating any future purchases they were recorded this way.

The second was if we followed Mr. Wells suggested treatment of terminating the lease rights at that point of time and reversing the prior treatment it would mean changing the earnings of that year, and as it later turned out, the previous year. But it would take these same earnings and put them

forward on a month to month basis immediately. So there were two evaluations, both of which we had the right to do. So the question was, as I asked Mr. Wells, was why don't we do this at the security analysts' meeting. This is something that really the stockholder has a lot of feeling on it and we are really affecting him somewhat here. Why don't we put up a trial balloon at the security analysts' meeting, because we were largely an institutionally held company in those years and these 80 analysts for the most represented a good share of our stockholdings. I said why don't we throw a trial balloon out here and say that we are considering treating these on the operating method, and his comment back to me was fine, we will do so.

He, that weekend, prepared the draft of the news release and called me later in the week and read the draft to me over the telephone and I approved it.

THE COURT: I am going to suspend at this time and resume about 2:15.

You may step down.

(Witness Temporarily Excused)

(Luncheon Recess)

AFTERNOON SESSION

2:15 P.M.

(In open court)

R I C H A R D R I F E N B U R G, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. UNGER:

Q Now, with reference to the May 4th meeting --

MR. DEVINE: I am sorry to interrupt. May I ask if there are any additional witnesses present for this afternoon, that they be excluded during the continuance of Mr. Rifenburg's testimony?

THE COURT: Are there any fact witnesses?

MR. UNGER: Two expert witnesses.

THE COURT: I will exclude them if counsel wishes.

MR. DEVINE: No, your Honor.

THE COURT: All right.

Q Between the time of this conversation that you just related and May 4th, did you have any further discussions with Mr. Wells or anybody else from Mohawk with respect to this possible change in accounting you have been telling us about?

A The conversations we had were probably fairly frequently. Basically it was a reaction back from the analysts that were at the May 4th meeting --

Q With reference to the conversation that you testifi to just before we broke, in April and May 4th, did you have any further conversations with Mr. Wells or anybody else from Mohawk with respect to the subject matter of that possible accounting change?

A Only the conversation where Mr. Wells telephoned me the results of the -- I am sorry, with the draft of the news release that was used at the May 4th meeting and I approved the news release as it was subsequently released.

Q Now, did you have conversations subsequent to May 4, 1971, with respect to that change in accounting with Mr. Wells or anybody else from Mohawk?

A Yes, I discussed it, as I said, periodically with Mr. Wells, mostly getting a reaction back from Mr. Hengen as to what the analysts' reactions were to this proposed treatment. And also informed Mr. Johnson, our chairman, that come the June board meeting we would be making such a proposal to the board.

Q When did you inform Mr. Johnson about that?

A I would guess towards the end of May. It would take that long to get the information back. We had two things to wait for for the meeting, the results of the audit, so we could come with the auditors changes, in addition to any changes we wanted as a management policy.

Q And when was the board meeting to which you just referred?

A It was sometime in June. I am not exactly sure of the date. I think perhaps June 15th or 18th.

Q Towards the end of June?

A Yes.

Q Does June 30th refresh your recollection?

A Probably.

MR. UNGER: No further questions of the witness at this time, your Honor.

THE COURT: All right, you may cross examine.

CROSS EXAMINATION

BY MR. DEVINE:

Q You testified about a meeting in March of 1971 with representatives of Ladenberg-Thalman.

A Yes.

Q Was Mr. Stoutenburgh present at that meeting?

A No.

Q In January of 1971 what, approximately, was Atron's book value?

A Four million two.

Q And what was their cash position at that time?

A About $3,000,000.

Q If the merger between Atron and MDS-Atron had not

occurred, what would Mohawk's stock position, stockholder position vis-a-vis Atron have been subsequent to April 30, 1971?

A At the last financial statement that I can recollect Atron had a value of approximately $4,000,000, four million two. We had about a seventeen percent position. Consequently our investment was worth about $200,000.

Q I have trouble with the mathematics there. It seems to me that 20 percent of four million is 800,000.

A I am sorry, 800,000. I just did the wrong multiplication.

Q Now, if that merger had not been approved, Mohawk would continue to have held restricted Atron stock. Is that correct?

A That's correct.

Q Did you ever inquire of anyone as to the ability of the market in Atron stock to handle a sale of a block the size of Mohawk's block?

A Our block was restricted stock, and as such the question of selling it really wasn't the prime question. The question was, could the company survive without coming with us and I think the answer is no. So our internal intent was if they didn't come with us, that stock was probably worth less. So selling a block of stock that size of a company that,

In effect, did not have future, it didn't have much value.

Q Do you know whether or not there were any other merger possibilities for Atron at that time?

A No. I know that Atron indicated that they were looking either to join somebody or somebody -- or have someb join them months earlier, but I knew of no other specific negotiations that were going on.

Q Do you have any knowledge as to whether at that ti in 1971 a company with a $4,000,000 book value and $3,000,0C in cash might be an attractive merger candidate?

A It would be an attractive merger candidate at $3,000,000 because the inventory was specifically - the difference between the three and four million was principally inventory. The inventory was slated toward a product of which we were the 90 percent customer. So a purchaser of Atron would have to examine the $3,000,000 cash as a value item, with an expenditure rate of $200,000 a month. At the same time they would have to look at the inventory as either using that product or selling to MDS and MDS had already indicated its intent to purchase or produce this item on its own. So Atron had a candidate value to somebody else of $3,000,000.

THE COURT: Were you going to stop these purchases ist to bump like that?

THE WITNESS: No. After "X" number of units were

produced we had the right to manufacture and I am sure there was a 30 day or 90 day notice period.

Q Could you have built facilities and retained people of the Atron quality in 30 companies?

A Already had facilities and we assemble the same type of products that Atron does. It is principally a printed circuit board operation. MDS at that time was producing some 10,000 printed circuit boards itself. Yes, we could go into business very quickly on it. But again we weren't in need of that product that fast.

Q Now, the effect of the merger on Mohawk's shareholdings in Atron was to free the restriction, was it not?

A I'm sorry?

Q As a result of the merger, the restriction on the Atron stock owned by Mohawk became an irrelevancy, a moot question, didn't it?

A Yes.

Q You testified to a conversation with Mr. Wells that took place in a company car.

A Yes.

Q I did not place the date of that conversation.

A And I am sorry, I was a bit unclear on it because I am a bit unclear. It would probably be somewhere the last week of April, I believe around the 25th or 26th. I was unable

to identify ex[illegible] when this took place.

Q Where was the company car at the time this conversation took place?

A I believe it was in New York City.

Q Now, were you in New York City on the 30th of April?

A No, I was not.

Q You had no conversations in New York City on the 30th of April with Mr. Wells about this press release?

A No. I believe my conversations with Mr. Wells on this press release were by telephone, two telephone calls. One around the 30th of April that I discussed earlier, the second I believe was at my apartment or my condominium in Florida over that weekend and he phoned me down there. That was with Mr. Hengen's draft.

Q Now I am confused. I see page 38 of Plaintiff's Exhibit 15 and I see a certificate there by John Walters saying that you appeared before him in New York City on the 30th of April. Does that refresh your recollection as to whether you were in New York on the 30th of April?

A It doesn't help my recollection and I think for this reason: this is a closing document of a very complex merger and the closing documents were all prepared for the signature and for the closing and it may have been the 30th that I signed

this, it may have been as part of the closing documents I may have signed it the day before and it was put together at the time of the closing documents. I have to say that I suspect I was not in New York on the 30th but this certainly indicates I might have been or was a prepared, signed ahead document that was prepared the next morning. It is a legal document that was prepared among many hundreds of others and I have no recollection.

Q You testified that at the June 30, 1971, meeting of the Mohawk board, that the audit had been completed Is that correct?

A Would you repeat that, please?

Q Well, I will change it.

As of June 30, 1971, had the audit of Mohawk financial statements been concluded?

THE COURT: For what period?

MR. DEVINE: For fiscal 1971.

A It had been concluded but not signed off. The principal information had been given to us by Leidesdorf with certain suggestions that we took to our board of directors.

THE COURT: How on earth could that be? Weren't you doing business on April 30th? This man has asked you whether as of April 30th, the fiscal year ending April 30, 1971, had been concluded?

MR. DEVINE: I said June 30th, your Honor, I am sorry.

THE COURT: I am sorry, I thought you said April. Reframe the question, please.

MR. DEVINE: Yes.

Q At the board meeting, the Mohawk board meeting on June 30, 1971, at that time had the Leidesdorf audit of Mohawk's financial statements been concluded?

A For the most part. The actual signing off of the auditors had not taken place but they gave us the audited figures with certain suggestions in terms of reserves and things of this nature that we had yet to submit to our board of directors.

Q When had Leidesdorf's audit begun?

A Oh, again I can't give you a definite date. I would surmise April.

Q Do you know when in April?

A No, I don't.

Q Was it the practice of Leidesdorf to audit financial statements previously prepared by Mohawk as, I think, is standard?

A I suppose.

Q Well, do you have any knowledge as to whether the audit procedure was for Mohawk first to prepare its financial

statements and then to have Leidesdorf audit them, or did Leidesdorf actually prepare the statements in the first instance?

A An audit of a company our size requiring a number of different actions from the auditor including testing inventories, testing machines in the field and things of this nature. The audit takes generally the best part of 60 days, which includes a review of financial statements we prepare. So it has to be a little of both I am afraid.

Q In connection with the merger between Atron and MDS-Atron, to your understanding at that time, early 1971, was it possible to have a registration of the stock to be issued by Mohawk on the merger such that the securities would be freely transferable at the time of the merger?

MR.UNGER: Objection, your Honor. I will stipulate you can register stock if you file a registration statement.

THE COURT: Well, I suppose it is proper to ask this witness his state of mind or knowledge as of that date. Certainly he can't be asked for expert testimony.

I will let it be answered.

A I believe the answer is that the company did not want to have private stockholders. Consequently at the first convenient time wanted to give these individuals the righthof registration without the course of a specific individual regis-

tration for their purpose. Mohawk prepares an S1 or registration statement each year because of certain commitments we have on older securities that must be refreshed every year. So consequently if the merger itself did not allow them to have free and unregistered stock, which it has not or did not, then the next period of registration, which was a normal cycle type thing for us, we gave them the right to be registered at that time. We had to go through the cost of registration in any case, so it was no extra cost to the company to allow them to piggyback on the reigstration we had to prepare.

Q Were you party to any conversations particularly with Mr. Stoutenburgh considering whether or not it was possible to have a registration statement that would take effect on April 30, 1971?

A I will repeat my conversation with Mr. Stoutenburgh on January 29th. I told Mr. Stoutenburgh at that time that if it was possible for the private stockholders to be as part of the proxy to become free stockholders, that was in everybody's best interests. If not, at the next registration period we would allow them to be registered at that time.

Q Did Mr. Stoutenburgh ask you at that time or any subsequent time whether the registration could be effective as of April 30, '71?

A No. I don't believe we ever discussed it again.

Q On April 30, 1971, did you have a belief as to whether the holders of Atron restricted stock would receive freely transferable Mohawk stock?

A The question never arose.

Q Can you recall the time, the last time prior to April 30, 1971, when you considered that question?

A It would probably be January 29th or the day, the following day or two when we were with our attorneys I presented the question as one of the items that were brought up during the negotiations, so when the contract and progression went forward that they would take this into account. So I would say January 29th plus, perhaps, two or three days.

Q What did your attorneys tell you at that time?

MR. UNGER: Objection, your Honor.

THE COURT: Overruled. For heavens sake, sit down. That's the most silly objection I have had yet. How can it possibly be privileged? They are advising the corporation here.

Is that what you are asserting, attorney client privilege?

MR.UNGER: Yes.

THE COURT: Overruled.

A They just accepted the information from me and said

they would look into it.

Q Did they ever respond to you?

A Not that I can remember. They may have to our corporate attorney and this one necessarily come back to me.

Q Did your corporate attorney ever report to you on the answer received by the outside attorneys?

A No.

Q Did you ever seek out an answer to that question?

A No. Let me qualify that. When it became later apparent that they did wish to register the stock, I did give my permission to be on the next registration statement which I had offered earlier, even though we apparently did not have a requirement to do this and this was not part of the contract, there was I believe a fifteen percent requirement going back to the original investment letter. We felt it was a nuisance to have a small number of shares registered or was also a nuisance to have unregistered stock. Consequently we were more than pleased to have them come in on that statement.

Q After April 30, 1971, when for the first time did it come to your attention that the holders of restricted Atron stock had not or were not going to receive freely transferable Mohawk stock.

A I am not sure I was aware of it until it came time

to prepare a new registration statement, which would be, oh, probably in the July or August period -- I'm sorry, June or July period.

Q Did Mr. Ablove check with you the language of his letter of May 26th to the Atron shareholders?

A He may or may not have. He normally did but I can't recollect specifically having seen that letter.

THE COURT: Would that affect your rights, whether he had or not? This is a May letter, isn't it?

MR. DEVINE: Yes, your Honor. I withdraw the question.

I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. UNGER:

Q Were you prepared if Atron did not accept or did not agree to merge with Mohawk back in January of 1971 to possibly manufacture those machines yourself, the Atron machines?

A The answer is yes. We have a long-term responsibility to customers, as I mentioned --

THE COURT: Yes is good enough. The question says possibly and that question has very little meaning.

Did you have a plan if they rejected this merger?

THE WITNESS: Yes.

THE COURT: What was your plan?

THE WITNESS: Our plan was to go ahead and add to our engineering staff and software staff the necessary specialists to go ahead and produce product and give it long-term support.

THE COURT: Did you tell the people at Atron that?

THE WITNESS: Yes, I did.

THE COURT: All right..

Q If the merger did not go through, were you prepared still to take Mohawk's business away from Atron?

A Yes, sir.

Q Were you prepared, therefore, to lose -- if Atron, as you have testified, would probably go out of business, were you prepared at that point to lose your investment in Atron?

A Certainly. The investment was very small in connection with the long-term --

THE COURT: This company had three million dollars cash in the bank?

THE WITNESS: Yes.

THE COURT: You thought you were going to lose that?

THE WITNESS: Depending on how they were going to

sperd it. If they kept it in cash and liquidated the company and distributed the cash, then it would be okay. They were spending at the rate of $200,000 a month.

THE COURT: Anything further?

MR. UNGER: No further questions.

THE COURT: Any further cross?

MR. DEVINE: No.

THE COURT: You may step down.

(Witness Excused)

P H I L I P S C A T U R R O, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UNGER:

Q By whom are you employed, Mr. Scaturro?

A I have my own firm.

Q What is the name of that?

A Roberts and Scaturro Company.

Q What does that firm do?

A We are a private investment firm.

Q Would you give me a brief statement of your background, starting from college.

A I graduated from Williams College in 1960 with a Bachelor of Arts degree and have both a law and a master

in Business administration degree from Columbia University.

Q Now, after you graduated from Columbia University, what did you do?

A I was in the service for a short period of time, in the Army for about six months. Then I joined the investment banking firm of Ladenberg-Thalman and Company in, I believe, the spring of 1964.

Q How long were you with Ladenberg-Thalman and Company?

A About three years.

Q What did you do when you were with that company?

A I did both special situations, research and institutional selling, as well as the management of a small number of individual discretionary investment accounts.

Q Now, did there come a time when you were with Ladenberg Thalman when you became interested in Mohawk Data Sciences Corporation as an investment?

A Yes.

Q After you left Ladenberg, where did you go?

A I left Ladenberg, I believe, in the spring of '67 and went to another New York Stock Exchange member firm, Sellin, S-E-L-L-I-N, Forbes, F-O-R-B-E-S, and Smith, Incorporated.

THE COURT: When did you start to follow Mohawk?

THE WITNESS: I think it was in early 1966, your Honor.

* * *

* * *

Q Your company is the general partner in these limited partnerships?

A Well, my partner and I as individuals, to be completely accurate.

Q And what is your function as the general partner?

A We invest the funds of the partnership in common stocks primarily.

Q Now, during the period when, particularly 1970, 1969, 1971, did you follow computer stocks?

A I followed computer stocks as an investor. I would never have considered myself to be a securities analyst on the computer industry. But I followed that industry -- many of the stocks in that industry from a stock market point of view during that period, yes.

Q Are you familiar with the stock prices of Mohawk on the New York Stock Exchange for the period January 15, 1971, through December, 1971?

A Yes, I think I am in general.

Q And have you, in connection with your appearance here, studied the Dow Jones industrial average for that same period?

A Yes, I have.

Q Have you studied the prices of Telex Corporation for that period?

A Yes, I have.

Q That is a computer stock?

A it is a computer peripheral company, yes.

Q And Potter Instrument Company, is that a computer stock?

A Computer peripheral company.

Q Did you follow that stock?

A Its market action, yes.

Q California Computer Products, is that a computer stock?

A Yes.

Q And did you follow -- you studied the market action of that stock for that particular period?

A Yes.

Q International Business Machines, did you study the price of that stock for that period of time?

A Yes.

Q The year 1971?

A Yes.

Q Control Data Corporation, did you study the price of that for that same period?

A Yes.

Q Memorex Corporation, did you study the market price for Memorex during that period?

A Yes.

Q These stocks are all listed on the New York Stock Exchange and American Stock Exchange?

A Yes, they are -- yes, they were.

Q Let me ask you this: when we came to you and I asked you with respect to some computer companies that you thought would be comparable to Mohawk, did you give us the companies I have just mentioned as companies which price action might or might not follow Mohawk?

A I suggested in the case of Telex, Memorex, Potter, Cal-Comp, that they were considered in the market place to be part of a group that was known as the computer peripheral group. I also suggested that IBM as a leader of the computer industry would be relevant to compare its price movements and Control Data, which although not exclusively a computer peripheral company, had other than IBM, had the largest percentage of a computer company in peripherals. So I suggested these companies, yes.

MR. UNGER: I have here a copy of the Wall Street Journal, your Honor, of varying dates --

THE COURT: You see if this witness has made a study and produced it in graphical representation he can testify as to what he did and what resources he derived it from and that is sufficient. Counsel can then ascertain

whether the data is accurately depicted.

Is that what you did? Tell us exactly what you did.

THE WITNESS: Your Honor, I suggested that Beekman and Bogue draw up a graph of these from sources which included going to the Standard & Poor's Company, which has a service which publishes the daily price movements of all of the listed stocks, and to chart them for the period that we are talking about.

THE COURT: Was that done under your direction and supervision?

THE WITNESS: That was done at my direction and I have looked at the prices and compared the prices from those sources and compared it with these charts and this is an accurate, in my judgment, representation of that.

Q Now, IBM is on this side and all the other stocks would run from one up to $90 a share?

A Yes.

MR. UNGER: We are, we did not superimpose the Dow Jones average on it and that is why I would like to mark that. I think the Court can take notice --

THE COURT: The Court can take notice of all these quotations if they are relevant. He can testify as to what conclusions he draws from it from his experience.

xxx (Defendant's Exhibit AE marked for identification.)

THE COURT: Since that is a purely mechanical depiction of published quotations, the plaintiff should have an opportunity to verify its accuracy.

There is no judgment involved in here except selecting the stocks to be depicted. Is that right?

THE WITNESS: That's right, your Honor.

Q You believe the stocks you gave us are a fair cross section of computer companies, computer peripheral companies at that time, 1971 period?

A Yes, I think that was a good sample of them.

Q Now, looking at that chart, do you have an opinion of the reasons for the decline in market price of Mohawk Data Sciences stock for the period commencing May 1, 1971, through December 31, 1971?

A Well, my --

MR. DEVINE: I object, your Honor. I don't think this witness has been qualified in any way to draw conclusions as to reasons for market action from looking at the market action itself.

THE COURT: Well, he has been tendered to the Court as an expert. He has brought securities for himself and for these partnerships that he represents. He professes knowledge in the field of computer stocks during those years. That is

an issue which may be tested on cross examination. If you want to have a voir dire on it, you may.

First I think the record has to show whether the witness discerns any pattern or any trend or any condition or state of this group of representative peripheral computer stocks that he is talking about, you see. You ought to begin with that. Then he can give his opinion or reasoning with respect to Mohawk.

Q Do you discern any trend, looking at the price action of all those various stocks, computer stocks that you gave us, in the period January 1, 1971, through December 30, 1971?

A I think in the first period that you talked about from May 1st to the end of November there was obviously a trending down in all of these stocks. I think that was part of a market phenomenon. If one looked at the stock market at the same period of time, about the end of April, the stock market made a high and then declined, depending on which market average you wish to use. I think about 16½ percent in terms of the Dow Jones from its peak to its low point at the end of November.

These computer stocks did decline by greater percentages during that period of time. IBM, the leader in the industry, declined over 20 percent, almost 22 percent,

I believe. And some of these stocks declined in excess of 50 percent, including Mohawk, during this period of time. I think it is quite typical that less seasoned companies will tend to be more volatile particularly during market declines. So this wouldn't have been a very surprising development.

In general they all seemed to have followed a fairly similar pattern. They made their highs at different times, but within a short period of time they made their lows at very, very similar times in November. All of them had, except for IBM. IBM made its low earlier than the others we have pictured here. But the overall market as measured by the market averages and all of these other stocks made their market lows at the end of November. If it is at all relevant, the turnabout occurred, in my judgment, as a result of the so-called Smithsonian accord, which was announced at that time, which brought some kind of stability for at least a time to the international structure, had been sort of cut adrift by President Nixon's speech in the middle of August of 1971.

Q Have you in connection with your study looked at the percentage decline of these various computer stocks?

A Yes, I did.

Q Now, can you give me the results of that?

A Well, as I mentioned, IBM declined a little over

20 percent from its peak in 1971 to its low point and I think the largest decline was, I believe, in the stock of Memorex Corporation. But it is my recollection that all of these companies, with the exception of IBM, declined more than 50 percent. I think 55 to 70 some odd percent was kind of the range. Mohawk was, I would say, in the high 60 percent range from its peak to its low point.

Q Now, based on your study, do you have an opinion for the reasons of the decline in the market price of Mohawk from approximately May 1, 1971, through December 31, 1971?

A Well, while the stock market is always a very complicated mechanism, trying to attribute any specific reasons for a decline, it is my judgment that when you have a generally declining market and where all stocks of a particular industry group are declining fairly much in tandem, it is my conclusion that it was really a general market phenomenon rather than anything specific for Mohawk Data. It was declining with the stock market and with other companies in its industry.

Q Now, on July 7, 1971, Mohawk announced its earnings for its 1971 fiscal year.

THE COURT: Is that a question?

MR. UNGER: I just want to put the exhibit in front of him.

Q Now, I am going to just show you Plaintiff's Exhibit 25 for identification, which is a press release of July 7, '71. I call your attention to the financial information on the last page. Also Plaintiff's Exhibit 33 in evidence, which is the Mohawk annual report for its fiscal year ending April 30, 1971.

Have you looked at those financial statements?

A Yes, I have.

Q Now --

A To be perfectly honest with you, I recall having looked at these at a previous time. I have not frankly looked at them recently.

Q Take a moment to look at the prices on the release.

A All right.

Q That last page of the press release.

(Pause)

Q Now, in your opinion, did that particular announcement of July 7, 1970, have any specific effect on the market price of the Mohawk stock traded on the New York Stock Exchange?

A Well, it is my recollection that it did have some impact the following day. The stock declined by more than ten percent the following day.

As to whether the remainder of its decline was

attributable to this, it would be my judgment that the market factors that I indicated before were probably more important.

I noted, for instance, that the stock got back to almost the price that it sold at on the day after this announcement, some months later back to 28 and a fraction after it had dropped to 29 that particular day, after having declined prior to that.

So I think it would be very difficult to isolate this particular reason except for that one day phenomenon. Probably one would have to ascribe that day's action to the release of this particular statement.

THE COURT: In making up your list of comparables, did you exclude any computer peripheral company?

THE WITNESS: I am sure I did, your Honor.

THE COURT: Which ones did you exclude?

THE WITNESS: I just picked ones that I recalled from that particular period of time that I was somewhat familiar with.

THE COURT: You didn't knowingly leave any out?

THE WITNESS: No.

THE COURT: Do you know what the earnings pattern or the earnings reported from these other companies was during that period?

THE WITNESS: Again I would have to refresh my

memory right now, since a number of these are not companies that I currently follow.

Q I show you Plaintiff's Exhibit 22 in evidence, this is precisely dated May 4, 1971. I just ask you to take a look at that one.

(Pause)

Q Now, I am just going to give you the closing prices of Mohawk stock that we have stipulated to in the pretrial order and ask you with reference to the study that you made of these different stocks whether in your opinion that particular press release or that announcement had any significant effect on the price of Mohawk stock on the New York Stock Exchange for the days either May 4, 1971, or within a day or two after that.

A Well, there was very little change in the price of stock for a few days. It did start selling off on the 6th of May. Again this is all part -- I would think it is part of this overall market decline. I don't think that one can say that anything of a fundamental nature has no impact. But it was one of the things that investors would obviously look at. It didn't apparently have an immediate reaction.

Since the overall trend of Mohawk stock was fairly comparable to other issues, I would have a hard time isolating

any price action as directly the result of this statement.

MR. UNGER: I would ask that chart be marked in evidence, your Honor, together with the stock prices themselves from which the chart is made up.

MR. DEVINE: Your Honor, I have some difficulties with the chart. I object to its admission. The primary difficulty I have is that it has two scales. The chart introduced yesterday has the same defect, in that there is, on the left, standard. In this chart and in the chart which is Defendants' AC, there are two scales. The different lines are relating to different standards.

THE COURT: The Court understands that the right-hand scale relates solely to IBM. Is that correct?

MR. UNGER: The reason we did that --

THE COURT: Just answer. Is that so?

MR. UNGER: Yes.

THE COURT: I don't think that is a serious objection. We would have to recognize IBM would be on a different axis, wouldn't you?

MR. DEVINE: If this were properly prepared, IBM would be on the ceiling some place and the movement up there of IBM on a percentage basis is not at all equivalent to a percentage basis down here. So the IBM percentages are out --

THE COURT: That is why he used a second axis. It is

merely a compilation of data which is admissible. By itself it means nothing more but that it is easier to look at.

MR. DEVINE: The representations I think are a little bit questionable.

THE COURT: I will take it. What is the number of that exhibit?

MR. UNGER: This is Defendants' Exhibit AE.

xxx (Defendants' Exhibit AE received in evidence.)

Q Can you explain why this chart was prepared this particular way?

A I suggested that it is really getting down to the same problem with trying to depict rates of change that are similar. For instance, if I can just point out, your Honor, the movement on the price of Atron here, if you looked at it as a representation of the price movement and tried to relate it to Mohawk's price action on this kind of a representation, because Mohawk's price was four times or something, it really doesn't give you a picture of whether they did anything together. This is just merely or really trying to put this scale which would really show that you had two companies a merger arrangement which was on a one to four basis. the chart, I suggested it would be put on that four so you could see how the stocks were doing particular period of time. In other words, on a

percentage basis.

THE COURT: I really don't know whether that is an appropriate statistical technique the way you have done it here. I must say I don't know. I will have to take it under advisement and reserve decision on it.

It seems to me you can state in terms of a table by simply dividing the Atron -- by simply dividing the Mohawk price by four, you could make the two of them comparable, couldn't you?

THE WITNESS: Yes.

THE COURT: Whether this is a proper statistical technique, I am not certain.

THE WITNESS: There is a distortion when a stock goes up three and a half points on a seven dollar basis. It is a 50 percent appreciation. But when represented on a scale of the same -- on one scale it would not look the same way as a 50 percent rise as a stock that goes from 50 to 45.

THE COURT: The weight to be given to this can be taken up in the post trial memoranda. I think there is an amount of difficulty with the two axes on that exhibit.

THE WITNESS: I was trying to depict rates of change. That is what I was really getting at.

Q Mr. Scaturro, if you were interested in tracking two stocks, for example, Mohawk and Atron, were on a four for

one basis, would this be the way it would be done in your business?

A I mean I wouldn't say that it is the only way that it can be done. It would achieve the kind of picture that I was looking for, the comparisons that I was looking for, yes.

THE COURT: During these years, would you have considered Mohawk a more seasoned or more widely traded or more marketable stock than Atron?

THE WITNESS: Absolutely.

THE COURT: Then would you next expect once the merger was announced that the Atron price would be just slightly less one-fourth?

THE WITNESS: That is what I would expect would be the case.

THE COURT: Is that what it shows?

THE WITNESS: Yes.

Q Would that be the result of the arbitragers getting into the stock after the merger was announced?

A Yes. It rarely trades at parity with the terms of the deal, so to speak, because there is always the possibility of the merger falling through. So there is also a discount for that uncertainty.

THE COURT: A fellow wanting to sell wouldn't take

much less if he thought the deal was going to close shortly.

THE WITNESS: That's correct. It gets smaller as boards approve and as it gets closer, and so on.

MR. UNGER: No further questions. I assume that document has been marked in evidence?

THE COURT: Yes, that was taken in for what it shows, subject to the difficulties which are on the statistica side of it.

CROSS EXAMINATION

BY MR. DEVINE:

Q What was the price of Atron stock on January 29, 1971?

A My recollection is it was seven and a high fraction. I don't recall exactly.

Q What was the price of Mohawk on that day?

A I think it was something, close to 30 or slightly under $30 a share.

Q So that the ratio on that day was about one-fourth. Is that correct?

A That is approximately true, yes.

Q Was Atron tracking Mohawk's price at that time?

A You mean on the 29th?

Q Yes. When the announcement was made?

A Yes.

* * *

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restriction on Atron's price as it is Atron's price following Mohawk. Isn't that correct?

A It is certainly possible, certainly possible.

Q The so-called tracking of Mohawk's price by Atron's price would only occur if the general public thought the merger was going to be approved. Is that correct?

A That's correct.

Q So that if information different from the information that was available during the January to April 17th period was public, which had a negative impact on Mohawk, would that have possibly increased doubt as to the approval of the merger?

A I think it is possible that that could have happened. You know, it is all very difficult to know. I mean one would have to look into the minds of people who were interested in Atron stock on its own at the time and then relate it to other things that were happening in the market place during that period of time.

Q There is no real way you can do that, is there?

A No way I can look in anybody's minds, no.

Q During early 1971 when you were following Mohawk -- did you testify that you were following Mohawk at that time?

A I was, yes.

Q In doing it, did you also follow Mohawk's earnings?

A To a certain degree, yes.

Q Did you discount Mohawk's earnings for any reason during that period?

A Did I discount them?

Q Yes. In evaluating the earnings, did you discount them?

A During what period of time are we talking about?

Q January to April, 1971.

A I am not sure I understand what you mean by discounting.

Q Did you know of any factor which bore upon Mohawk's reported earnings which led you, in evaluating those earnings, to discount their amount by some number of cents or by some percentage?

MR. UNGER: Objection, your Honor.

THE COURT: Perfectly reasonable cross examination. The witness can be asked.

A No.

Q During that period did you know that Mohawk was selling to so-called nonaffiliated third parties equipment which Mohawk previously had leased to other parties?

A I just don't recall that, to be honest with you, whether I knew that or not.

Q Would you name some of the other computer peripheral

* * *

* * *

But prior to that I had not seen it for awhile.

Q Did you give your opinion as to the market action, the reasons for the market action of Mohawk here today before you were shown that annual report?

I withdraw that. I am sorry.

THE COURT: It is withdrawn.

Q Do you know on what day the press release that's dated May 4th was actually released to the medium?

THE COURT: I think he means actually published.

A I don't know specifically that it is other than the date indicated but I don't know one way or the other.

Q You don't know whether it was released during the market day of May 4th or whether it was released after the market day?

A I don't know.

Q Do you know whether it was released during the market day of May 5th?

A As I said, I would not know exactly when it was released.

Q I am pointing to the Mohawk market price which appears to be on or about May 2, 1971.

A Is that the high point you are pointing to?

Q I am pointing to what appears to be about May 3rd or May 2nd, all right?

A Right.

Q Now I point to what appears to be about July 5th or 6th. Now is it fair to say that there was a general decline in Mohawk's price during that period?

A Yes, there was a general decline.

Q Is it possible that that general decline was the market gradually adjusting downward to general news which had been announced on May 4th leading to specific news, negative news released on July 7th? Could the market have been discounting that information during that period?

A I would be foolish as a person who deals in the stock market if I didn't think many things were possible. Certainly it is possible that that was the reason. I have only said that when I also observe that the stock market was in a general decline period during that period, having made its high quite coincidentally that was made in Mohawk stocks, and many other computer companies in exactly the same trend, that my conclusion would be that it was a market phenomenon that was the main impetus in the decline of Mohawk, as with the other stocks. It is possible it could be otherwise.

THE COURT: During those few days, did Mohawk, according to your chart, decline more rapidly or less rapidly than the average for the group you have depicted?

THE WITNESS: I haven't taken an average for those

few days. Looking at the price declines they all had what look like similar ones or many of them had similar ones.

Q Here is Control Data. Now, on May 3rd it is 83 and on May 10th -- May 17th, two weeks later, it is at 66. Now, do you know, sitting here today, whether that's a general market phenomenon of a drop of seventeen points or whether there was some specific news about Control Data that caused that?

A I don't know specifically about Control Data. But as I said, when I observe what the stock market was doing for the same period and I look to see what is the general drop in the market and the drop in many of the companies in this industry, I am led to conclude they were probably all part of the similar phenomenon, a general market decline.

Stocks decline in different percentages and by different amounts just according to lots of very technical factors in the market place. There may well have been a fundamental factor in Control Data that dropped it especially during that period of time. There might have been a technical factor, that someone had to liquidate a very large block during that period of time.

Taken as a whole, and that is all I was really saying before, I would have to conclude, by looking at the price movements in these stocks and in the general market, and

attribute it to general market phenomenon.

Q To the extent that was possible, there could be a specific reason for this drop in Control Data during that period. Is it also possible that drops in Mohawk stock could be due to specific reasons?

A It is possible in every one of these stocks.

MR. DEVINE: No further questions.

THE COURT: Any redirect?

MR. UNGER: No redirect.

THE COURT: You are excused.

(Witness Excused)

H A R R Y R O S N E R, called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. UNGER:

Q By whom are you employed, Mr. Rosner?

A Partner in the accounting firm of David Berdon and Company, 415 Madison Avenue, New York, B-E-R-D-O-N.

Q Would you give the Court a brief statement of your background?

A I am a graduate of Cornell University --

MR. DEVINE: The plaintiffs have no doubt as to Mr. Rosner's qualifications as a C.P.A. If he is to qualify himself

in any other area I would listen to the qualifications.

THE COURT: As a Certified Public Accountant?

MR. UNGER: Yes.

THE COURT: Your expertise in your profession is conceded.

THE WITNESS: Thank you.

Q I am going to place before you, Mr. Rosner, Plaintiff's Exhibit 18 in evidence, particularly for the purposes of the Mohawk financial reporting as contained therein, and Plaintiff's Exhibit 33 in evidence for the same purpose.

Now, have you studied the Mohawk Data Sciences' financial reports for its fiscal years ended 1970 and 1971?

A Yes, sir.

Q And have you studied the Mohawk Data Sciences' financial reports for the first and second quarters of 1971 fiscal year?

A Yes, sir.

Q Do you have those reports with you?

A Do I have copies of it?

Q Yes.

A Yes.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Have you marked this exhibit?

MR. UNGER: I ask these be marked for identification. You can mark them as one exhibit.

MR. DEVINE: He can mark these in evidence, your Honor. I have no objection.

THE COURT: All right.

xxx (Defendants' Exhibit AF received in evidence.)

MR. UNGER: Your Honor, I have a list of Mr. Rosner's qualifications, if you would want it. His qualifications have been conceded.

THE COURT: You are a partner in David Berdon and Company?

THE WITNESS: That's right.

THE COURT: How many years have you been practicing?

THE WITNESS: Thirty years.

Q Are you familiar with the methods of accounting employed by Mohawk Data Sciences Corporation in its financial statements for its fiscal 1970 and 1971 periods and for the periods encompassed by the two quarterly reports that we just marked in evidence as Defendants' Exhibit AF, in accounting for sales of leased equipment to nonaffiliated third parties?

A Yes, sir.

Q Now, would you explain the methods of accounting

employed by Mohawk with respect to those transactions in those two fiscal periods?

A For the fiscal year ended July 31, 1970, and for the first two quarters of the fiscal year 1971, Mohawk accounted for these third party sales -- third party transactions as sales under the so-called financing method, which I will explain in just a moment.

For the third period of the fiscal year ended April 30, 1971, and retroactively, Mohawk retroactively adjusted its accounting method to account for these third party transactions as lease transactions under the so-called operating method.

I would like to explain very briefly the difference between the financing method and the operating method. The principal accounting problem of a lessor of property is the allocation of rental revenue and expenses over the accounting periods covered by the lease.

There are two principal methods of making an accounting for the allocation of rental income and expenses over the accounting periods covered by a lease. One is called the financing method and the other is called the operating method. The financing method in effect recognizes the lease as comparable to a sale or loan transaction. The operating method accounts for the lease solely as a lease rent

transaction.

Under the financing method, the total -- the excess of the total rentals receivable under the lease over the cost of the property, giving effect to any adjustment for residual value, is considered as the consideration payable to the lessor for the investment that he has made in his property.

Under the financing method, if the recording is made as if it were a sale, the entire excess is taken into account by the lessor at the time of the transaction. If it is treated as though it were a loan transaction under the loan financing method, the excess is taken into account and periodic amounts on a declining base, depending upon the unrecovered costs of the investment of the lessor. Just as in the case of paying off of a mortgage, where you receive fixed amounts on behalf of both principal and interest, as the mortgage payments come in, a larger portion of each payment is applied as principal and a lesser portion is applied as interest. Likewise the income amounts via the financing method, where it is accounted for as though it were a loan transaction, results in smaller amounts each period being taken into income of the lessor.

Now, those two methods apply to the use of the financing method.

Where the operating method is used, the amount taken into income in each accounting period is essentially the amount of the rentals called for by the lease and in each accounting period there is charged to the income account of the lessor the other costs of the property, such as depreciation, maintenance and other costs. The difference representing the net profit reflected in the income account applicable to the lease itself.

THE COURT: In connection with the financing method that you have just described, is it customary to book any reserve for possible uncollectability or failure to pay or a rejection of the leased property before its useful life is expired?

THE WITNESS: Yes. I mentioned the excess of the rentals over the cost. Well, if it were to be recorded as a sale, that excess would have to be adjusted for any anticipated provision, for losses, uncollections, and so forth.

THE COURT: Including returns of less than the full life of the equipment?

THE WITNESS: That's correct.

THE COURT: All right.

Q Now, do you have an opinion as to whether the accounting methods that you just described were in accord with accepted principles of accounting for manufacturers of

computer peripheral equipment, such as Mohawk?

A You are speaking now at the time this accounting method was followed by Mohawk in 1970 and the first two quarters of 19 -- of fiscal 1971?

Q Right, and also as to the second method of accounting which you described.

A Yes.

Q Both methods were in accordance with accepted principles of accounting in 1970, 1971?

A Yes.

Q Upon what do you base that opinion?

A That opinion is based on two factors. One, are the pronouncement of the Accounting Principles Board of the American Institute of Certified Public Accountants. By way of shorthand, I will sometimes refer to them as A.P.B. Pronouncements made by A.P.B. up through 1971.

The second factor on which I base my opinion is the accounting practice followed prior to 1971 and during the year 1971 by manufacturers of computer peripheral equipment, and the approval of those accounting practices by their independent certified public accountants.

Q Would you explain to me the Accounting Principles Board?

A Yes, sir. Prior to 1970, the principal pronouncement

of the A.P.B. in respect of the method of accounting for leases in the financial statements of lessors was A.P.B. opinion number seven, which was issued by the A.P.B. in April or rather May of 1966. In this opinion the A.P.B. set down certain criteria and certain standards on the basis of which either the financing method or the operating method was to be used by lessors in their accounting in their financial statements for lease transactions. However, it is important to note that A.P.B. number seven deals and dealt solely with two party transactions, where you have a lessor and lessee. It did not deal with the situation of three party transactions. For example, where a manufacturer lessor transferred to an independent third party a lease or a property subject to a lease, and cases where a manufacturer transferred to a third party a property which later became subject to a lease. And in connection with such a transaction where the manufacturer undertook to assure to the purchaser of the property that over a period of time that person would recover not only his costs but also a return on his costs.

Now, A.P.B. number seven, as I said, did not deal with that type of transaction. And after the issuance of A.P.B. number seven in 1966, there were many variances in the application of A.P.B. number seven and also a great many variances in the interpretations of the provisions of A.P.B. 7

in that particular type of situation, in the so-called third party transactions.

As a result, prior to 1971, as a result of the variances in interpretation and the variances in application of A.P.B. 7, many accounting practices followed by lessors were followed and all these practices were considered as acceptable practices in accounting for lease transaction.

Because of the confusion and the differences in the accounting practice prior to 1971, the A.P.B. in November, 1971, issued what is called an accounting interpretation of A.P.B. number seven. And this accounting interpretation was issued pending the issuance of the A.P.B., based on a study they were then conducting, of a new opinion covering the subject matter of accounting for leases in the statements of lessors in connection with three party transactions.

THE COURT: Excuse me, I understand the witness is talking about an interpretative opinion in November, 1971. While that's very interesting, I don't conceive of how that could affect what was done in this case through and including April 30, '71.

MR. UNGER: Your Honor, there was some testimony to the effect that the A.P.B. -- I think by Mr. Wells and there may have been one other witness, that they had known this was information in the period that the board was consider-

ing this.

THE COURT: All right.

MR. UNGER: So I am just sort of drawing to what they eventually did reach.

THE WITNESS: I should like to observe, your Honor, the accounting interpretation, of which I have copies here, specifically adverts to the fact that because of the misinterpretation, the variances, that accounting practices of a varying sort had been followed prior to the issuance of this interpretation and they were all considered as accepted practices in accounting for these lease transactions.

This interpretation, as I said, dealt specifically with the three-party sales transactions which were completely not covered specifically in A.P.B. number seven issued in 1966.

As a matter of fact, after the release of the accounting interpretation in November, the A.P.B. in 1972 ultimately issued A.P.B. number 27 which deals specifically with a question of accounting for leases in the financial statements of manufacturers and specifically directed its attention to the circumstances and criteria and standards under which manufacturers assigning property, subject to lease, to third parties to account for them as sales.

As a matter of fact, the problem of accounting for

leases today is not at final rest because in 1973 the A.P.B. was supplanted by a new accounting board called the Financial Standards Board, and one of the few subjects on its original agenda has to do with the accounting for leases in the financial statements of lessors and lessees.

But the point I should like to emphasize is the fact that prior to the release of November, 1971, which, incidentally happens to be some six months after the issuance of the proxy statement in issue here, it wasn't until then that for the first time you had a firm pronouncement on the criteria necessary for a manufacturer lessor in a three party transaction to record the transaction as sales.

The second thing I looked at in basing my opinion that I gave before is the accounting experience and the accounting practice of a number of manufacturers of computer peripheral equipment, comparable to that sold by Mohawk Data Sciences, in third party sales under agreements comparable to those that MDS employed in the year 1970 and '71. And in each of these instances, and I have copies of those financial statements here, prior to 1971 each of these companies accounted for these third party sales under the financing method as sales. In 1971, in conformity with the new standard set down by the A.P.B., each of these companies, with one exception, changed their method of accounting to account for

these third party transactions under the operating method.

The one exception that I advert to is a situation where the company had no such sales in 1971. Therefore, it was in no position to act in that situation.

Q Now, could you tell me the names of the companies you are referring to and who their public accountants were?

A Yes. The first company whose transactions in 1970 were almost identical with those of MDS is a company called Optical Scanning Corporation, whose independent public accountants were and still are, I believe, Leibrand, Ross Brothers and Montgomery.

THE COURT: Before we extend the record with a list of these companies, may I just inquire of counsel, I don't understand it to be claimed that either of these methods, the financing method or the operating method, was inappropriate to use in 1971. You are not claiming that, are you? The focus here is toward the effect of the change-off, isn't it?

MR. DEVINE: Yes. But I do not concede that the financing method was proper. In fact, it is my belief that it was improper.

THE COURT: Prior to November, '71?

MR. DEVINE: Yes. I am not addressing myself now as to whether or not proof has been made of that because I think there is a lot that can be argued and a lot of facts th

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Q Name the companies.

A I should like to give the names of the companies involved and their certified public accountants.

Optical Scanning Corporation, for the fiscal year ended June 30, 1971, effective as of that date, they changed their method previously used from a financing method to an operating method. Their independent accountants were Leibrand, Ross Brothers and Montgomery.

THE COURT: They restated their prior year, did they?

THE WITNESS: That's correct.

THE COURT: In their annual report for the fiscal year you just mentioned?

THE WITNESS: Yes. As a matter of fact, the accountant's certificate is dated in December of 1971 and they make specific reference to the accounting interpretation issued by the A.P.B. as the basis for the accounting change.

THE COURT: Give us the rest.

MR. DEVINE: I would like to have a record objection to this line of testimony as not being probative because other companies may have done something similar, I don't think it is probative as to the propriety of the method itself.

THE COURT: I am inclined to overrule that objection for this reason: that what is generally accepted accounting

procedures is tested at least in part by what reputable accountants do with respect to the affairs of others. And if other accounting firms representing people in the same line of work, conducting approximately the same transactions with similar equipment in the computer peripheral field were booking their transactions in this way, that may be some evidence that this was being done in accordance with generally accepted accounting principles. Because while the A.P.B. may have some probative affect, it is really what people do that makes it generally accounting principles.

An accountant doesn't have to follow the A.P.B. precisely. Is that so, Mr. Rosner?

THE WITNESS: Yes.

MR. DEVINE: The only applicable standard is whether or not the financial statements adequately reflect the true business operations of the entity. I don't think that if all companies in an industry are jointly and commonly failing to reflect the true operations of that industry, I don't think that that provides an excuse or a defense for that practice.

THE COURT: All right. It is an interesting questio but I will have to continue to complete the record here. The objection is overruled but you may answer.

THE WITNESS: The next illustration, your Honor, is

Telex Corporation, whose independent accountants are Arthur Young and Company. I have financial statements here for the year ending March 31, 1970, and year ended March 31, 1971. There again, in the fiscal year '71, the method of accounting for third party sales was changed from the financing method to the operating method.

The next company is a company called Farrington Manufacturing Company, whose independent public accountants were Arthur Young and Company. I have a copy here of the 1968 annual report which indicates that during that period that company accounted for third party sales using the financing method.

The next illustration I have, I have copies of the financial statements of Data 100 Corporation whose independent public accountants were Haskins and Sells. There again, prior to 1971, they recorded the third party sales transactions by the financing method.

The last illustration that I picked up in preparation for the trial here, your Honor, is Control Data, Corporation, whose independent accountants are Pete Marwick Mitchell and Company. I have here a copy of their annual report for the fiscal year ended December 31, '69, as well as their first quarter report for the three months ended March 31, 1969, which explains in more particularity the nature of the third

party transactions recorded during the year 1969. There was a total of some 38 million dollars worth of sales recorded, third party transactions recorded as sales in that particular year. That company had no transactions after the year 1939 involving third parties. Therefore, this was the illustration where they did not change their method in the year 1971.

THE COURT: May I ask you with respect to each of those that you mentioned, was the prior fiscal year restated in accordance with the operating method?

THE WITNESS: Yes, your Honor.

THE COURT: In each case that you have mentioned, did such restatement result in a decrease or diminution of the earnings?

THE WITNESS: I do not recall, your Honor.

THE COURT: Wouldn't that automatically happen?

THE WITNESS: Yes. Let me explain why. Basically it would have to result for this reason: where a third party transaction is recorded as a sale, as I mentioned earlier, the entire difference between the expected rentals under the lease and the cost subject to adjustments for residual value, provisions for reserve is taken into income in the year of the transaction, in the accounting period of the transaction. Whereas under the operating method, it is spread out over the term of the lease. So that it necessarily must follow that

if you change from one method to the other, what is originally taken in in toto in one accounting period is subsequently spread over a three, four, five, six year period.

THE COURT: I state my historical past income downward and I am going to beef up my future income comparably?

THE WITNESS: That's right. The profit is still there. It is primarily a question when you record the profit. The profit instead of being taken in the first year, if it is recorded as a sale, will subsequently be taken in over the term of the lease, depending upon the period of the lease.

Q Is it your opinion that when Mohawk made the decision to change the method by which it was accounting for these third party transactions from the financing method to the operating method, that it was appropriate for Mohawk to restate the prior period for 1970 fiscal year for comparability purposes?

A Yes. Whenever there is an accounting change -- let me preface it by this statement: it is the accepted accounting practice in the presentation of financial statements to present comparable financial statements for two succeeding years. Therefore, as a result of an accounting change in the second year, unless you corrected retroactively the prior period, you would not have comparable financial statements, an

the practice always is where there is an accounting change affecting the prior period, to retroactively adjust the prior period so that the two financial statements are entirely comparable.

Q Now, you are familiar with the fact that Mohawk changed its fiscal year during 1971. Is that so?

A Yes, sir.

Q And how did it make that change? What was the change in the periods?

A Well, their fiscal year prior to 1971 had ended on July 31st. In the year 1971 the fiscal closing was changed from July 31st to April 30th. So the fiscal period ended on April 30, 1971, and covered a nine-month period instead of a twelve-month period.

Q What is the effect of that change?

A Well, the principal effect was that instead of having unaudited financial statements for nine months, the public, the stockholders and the corporation had audited financial statements for nine months. The auditors simply came in three months earlier and audited a nine-month period instead of a twelve-month period.

MR. UNGER: No further questions, your Honor.

CROSS EXAMINATION

BY MR. DEVINE: